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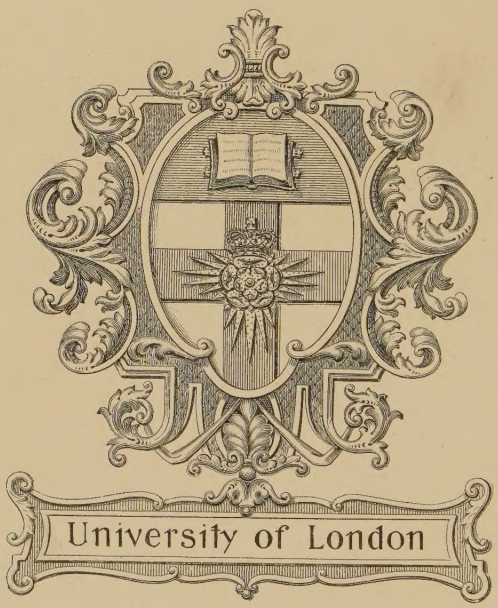

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

DESSAU *v.* PETERS, RUSHTON AND COMPANY, LIMITED.

SARGANT J.

1921

Oct. 20.

[1920. D. 773.]

Solicitor—Lien for Costs—Partnership Action.

When after the usual order for dissolution of a partnership has been made and a receiver appointed of the partnership assets, the plaintiff changes his solicitors, the former solicitors are not entitled to assert their lien for their costs of the action by retaining papers that have come into their hands in the course of the action, but must deliver them up to the plaintiff upon receiving the usual undertaking by the new solicitors for preserving their lien.

Boden v. *Hensby* [1892] 1 Ch. 101 applied.

ADJOURNED SUMMONS.

On May 5, 1920, the plaintiff commenced the above action for the dissolution of the partnership between the plaintiff and the defendants and moved for and obtained ex parte the appointment of an interim receiver. On May 30, 1920, the motion came on and the hearing was by agreement between

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the parties treated as the trial of the action. The usual order for dissolution of the partnership was made and the customary inquiries directed and a receiver was appointed of the partnership assets.

Messrs. Stones, Morris & Stone acted as solicitors for the plaintiff in this action until about April 30, 1921, when the plaintiff discharged their retainer and employed Messrs. Kenneth Brown, Baker, Baker, as his solicitors in their place. In pursuance of this change of solicitors the plaintiff requested Messrs. Stones, Morris & Stone to deliver up the papers in the action to his new solicitors. On April 25, 1921, an order had been made for the taxation and payment of Messrs. Stones, Morris & Stone's costs of proceedings that had been brought by the receiver to recover assets of the partnership. These costs had been provided for, but the costs of the partnership action had not been provided for, and Messrs. Stones, Morris & Stone claimed to assert their lien over the papers in the action and refused to deliver them up even upon the terms that their lien would be protected.

On June 1, 1921, the plaintiff accordingly took out this summons asking that, upon the undertaking of his solicitors to hold the papers thereinafter referred to without prejudice to the lien of Messrs. Stones, Morris & Stone and to return them undefaced within fourteen days after the conclusion of this action and to allow the said firm access to them for the purpose of making out their costs and also undertaking to produce them on any taxation of the costs of this firm, the said firm should forthwith deliver to the plaintiff's solicitors all papers, books and documents in their possession or power relating to the action and to the several matters arising out of the action.

Farwell for the plaintiff. A solicitor is not entitled to enforce his lien by refusing to deliver up papers relating to an action, if by so doing he will embarrass not merely the person who has employed him but third parties interested in the proceedings. In such a case he must deliver up the documents

upon undertakings being given that will protect his lien. Thus he may not retain the papers in an administration action because the creditors of the estate being administered are interested in the proceedings being completed: *In re Hawkes* (1); *Belaney* v. *Ffrench* (2); *In re Boughton* (3); *In re Caudery*. (4) Similarly the creditors of the partnership are prejudiced by the partnership action being delayed, as the existence of a receiver of the partnership assets would make it difficult to obtain execution to enforce judgments against the individual partners. It has been determined that in a partition action the solicitors cannot assert their lien by retaining papers because, apparently, encumbrancers may be interested: *Boden* v. *Hensby*. (5) It will be said that this contention is inconsistent with *In re Rapid Road Transit Co.* (6) But that case is distinguishable, because there the documents allowed to be retained came into the solicitors' hands before action brought: compare *In re Capital Fire Insurance Association*. (7)

A. F. Topham for Messrs. Stones, Morris & Stone. The rule is that a solicitor discharged in the course of an action has a lien over the papers relating to the action which enables him to retain them until his costs are satisfied. There are only two exceptions to this, as pointed out by Neville J. in *In re Rapid Road Transit Co.* (6) First, third parties who are interested in the action can claim delivery of papers which the solicitors could have retained as against their former client. Secondly, the client himself can obtain delivery of the papers when he is suing in a representative capacity: *In re Hawkes*. (1) The common example of that is a creditor's action for administration, and it is really an anomaly. When, as here, the plaintiff is not suing in a representative character and third parties are embarrassed by the retention of the papers, it is for them to apply for the delivery up of these papers. *Boden* v. *Hensby* (5) is not reconcilable with this,

(1) [1898] 2 Ch. 1.
(2) (1878) L. R. 8 Ch. 918.
(3) (1883) 23 Ch. D. 169.
(4) (1910) 54 Sol. J. 444.
(5) [1892] 1 Ch. 101.
(6) [1909] 1 Ch. 96.
(7) (1883) 24 Ch. D. 408.

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but the decision in *In re Rapid Road Transit Co.* (1) indicates that it was an undue extension of the decisions in administration actions.

SARGANT J. This case has been well argued, but I have no doubt as to the decision I ought to give. This summons is taken out by the plaintiff in a partnership action asking that his former solicitors may be ordered to hand over to his present solicitors the papers in the action, subject to the ordinary undertakings given in such orders to preserve the solicitors' lien.

The plaintiff began his action on May 5, 1920, and after obtaining the appointment ex parte of an interim receiver procured the usual judgment in a partnership action on May 30, 1920, and the appointment of a receiver. The solicitors against whom the application is now made acted for the plaintiff in this action and in prosecuting certain claims in proceedings outside the action, and were discharged by the plaintiff about April 30, 1921. It is recognized prospectively that the solicitors are going to be discharged in an order in the action dated April 25, 1921.

An order has been made as to the costs in the other proceedings, and with regard to those costs there is no question. The only question is whether Messrs. Stones, Morris & Stone are entitled to assert their lien against the plaintiff in an unqualified way, and hold the papers which came into their possession in the course of the partnership action against the present demand of the plaintiff.

It is quite clear that if the action were an action in which the plaintiff alone had a beneficial interest, such as an action against some outside defendant for some remedy against him, the plaintiff's solicitors would be entitled to assert their lien however much the plaintiff might be embarrassed thereby. It is also clear that the solicitors might do so in respect of a lien that arose before action brought.

The question here is whether, as regards proceedings in this very action, the solicitors are entitled to enforce

(1) [1909] 1 Ch. 96.

an absolute lien against the plaintiff on papers that have come into their possession in the course of the action.

Mr. Topham has admitted that, if this application had been made by the receiver or the defendants in the action and not the plaintiff, it would have been impossible to assert an unlimited lien; but he says that as against the plaintiff, who is the person who employed Messrs. Stones, Morris & Stone and voluntarily discharged them, they are entitled to assert their lien in an unqualified way.

Although this precise question has never been determined in a partnership action it has been determined in actions of a similar character. If the action were an administration action, it is settled that the plaintiff would be entitled to have the papers produced on the ordinary terms for preserving the lien, and the reason of this is quite clearly stated in judgments given in cases of the kind. It is that solicitors are not entitled to assert a lien so as to embarrass the proceedings in such an action. Solicitors may assert their lien so as to embarrass their particular client if he has chosen to incur the costs in question, but they are not entitled to do anything which has the effect of embarrassing not only the particular party but also other parties interested in the proceedings. As I have said Mr. Topham admitted this limitation in the case of an administration action, but he draws a distinction between a case like that and the present case. It has been decided that the same limitation applies to the solicitor's lien in winding-up petitions and also in actions by a liquidator outside the actual winding-up proceedings. It applies also to actions by executors outside the administration proceedings and to actions for the execution of trusts.

There is one case that is very analogous to the present one and it seems to me, if I may say so, to have been perfectly properly decided. That was *Boden* v. *Hensby* (1) where North J. held that the limitation on the lien applied in an action for partition. In that case there were probably only two persons interested in the estate in question—namely, the plaintiff and the defendant—and North J. after discharging the order of the chief clerk for

(1) [1892] 1 Ch. 101, 103.

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delivery up of documents which came into the solicitor's possession before the action was commenced continued: "As to the documents come to the hands of the solicitor for the purpose of carrying on the action, *In re Boughton* (1) does apply and the order of the Chief Clerk in Chambers will stand. The rule does not apply merely to actions for the administration of the estate of a deceased person; it is applicable to an action for the administration of the trusts of a deed, and to other proceedings of a representative character. This action, in my opinion, is one to which the rule is applicable. It is not so clear, as Mr. Howard says, that there are only two persons interested in the property. If it were, the Court would not have directed an enquiry as to incumbrancers." This is the ordinary inquiry as to encumbrancers in a partition action. "It is quite clear, as far as I can see, that only two persons are interested under the will; but the Court wishes to know who the incumbrancers of both plaintiff and defendant may be. It seems to me that this action is one in which other parties may be interested just as much as in an administration action, and that, subject to the distinction drawn in *In re Capital Fire Insurance Association*" (2), that is the distinction between documents obtained before and documents obtained after action brought, "*In re Boughton* (1) applies."

Now as in the present case a receiver of the partnership assets has been appointed, it seems clear that not only are the defendants directly interested, but that, if the action is not proceeded with and carried to a conclusion, it will cause considerable embarrassment to creditors of the partnership. It may be quite true that the creditors of the partnership would be entitled to bring actions against the partners individually in a way creditors of a deceased person could not do against the executors of the deceased's estate after there had been a decree for administration by the Court. But on the other hand, if the creditors came to enforce their judgments, they would at once find themselves embarrassed by the existence of a receiver.

(1) 23 Ch. D. 169. (2) 24 Ch. D. 408.

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I am of opinion that a partnership action is one in which not only the plaintiff but other parties are interested in not having the determination deferred of the questions to be dealt with in the course of the proceedings. And any solicitor employed in such an action knows from the start that, besides his client, other persons will be interested in the proceedings. It is therefore no hardship that his lien should be subject to the same limitation as in an administration action, that is one preventing him from asserting an absolute lien. He has a lien on the documents as against his client, but only such a qualified one as is recognized in other cases where the client is not the only person interested.

I will make an order in terms of the summons and must give the plaintiff his costs.

Solicitors : *Kenneth Brown, Baker, Baker ; Stones, Morris & Stone.*

H. C. G.

McLUSKEY AND OTHERS *v.* COLE AND OTHERS.

C. A. 1921 *Oct.* 18, 19, 20.

[1920. M. 1421.]

Trade Union—Expulsion of Member—One Trade Union Member of another—Agreement of Membership—Action to enforce—Claim for Injunction—"Directly enforcing agreement between one trade union and another"—Jurisdiction Action not maintainable—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4, *sub-s.* 4.

The plaintiffs were the secretary and other officials of an unregistered trade union called the Glasgow and District Glass Bottle Makers' Trade Protection Society, and the defendants were the secretary and trustees of the National Federation of Glass Bottle Workers, an unregistered trade union of which the plaintiff society was a constituent member. The Federation had passed a resolution purporting to expel the plaintiff society on the ground that the plaintiff society had by refusing to carry out a resolution of the Federation acted in contravention of the rules and thereby forfeited its membership. In a representative action for a declaration that the expulsory resolution was invalid, and that the plaintiff society was still a member of the Federation, and for an injunction to restrain the Federation from acting on the resolution :—

Held, by the Court of Appeal, affirming the decision of Peterson J., that the action was brought for the purpose of directly enforcing an

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agreement between the two trade unions whereby the one was admitted as a member of the other, and, under s. 4, sub-s. 4, of the Trade Union Act, 1871, could not be entertained by the Court.

Semble, one trade union may be a member of another.

APPEAL from a decision of Peterson J.

The action was brought by Peter McLuskey, the secretary, and other officials and trustees of the Glasgow and District Glass Bottle Makers' Trade Protection Society, suing on behalf of themselves and all other members of the society, against George Cole, the president, John Thompson, the secretary, and the trustees and all other members of the National Federation of Glass Bottle Workers, which, like the plaintiff society, was an unregistered trade union. The objects of the defendant society were stated in r. 1, para. 2, of the society's rules to be: "To unite in a fraternal bond the Glass Bottle Workers of Great Britain and Ireland, and to afford a medium of information and assistance for their common interests." Rule 2, para. 1, provided as follows: "Application for admission and re-admission into the Federation by organised societies shall be decided by the National Conference." Rule 4 (1.) provided: "That Districts defray their own delegates' expenses in attending National Conferences. That it be left to the discretion of each District as to the number of its representatives." Rule 6 (1.): "Should any full and clear member in any of the National Districts of the Federation leave the District of which he is a member to go into another he must produce a clearance from the Secretary before he be allowed to accept a situation in a bona fide and legitimate vacancy without payment of an entrance fee. (2.) All applications for situations in other Districts must be made to the District Secretary, and any member accepting a situation without his application passing through the District Secretary shall not be eligible to work." Rule 7 (2.) provided: "That any District acting contrary to the Standing Orders by refusing to act in accordance with decisions agreed to by the Conference or Districts, such District shall forfeit their membership." Rule 9 (4.) provided: "That no District shall deviate from Resolutions passed or decisions agreed to

without the sanction of Conference or Districts. . . . ." Rule 11 (2.): "Districts shall retain local autonomy." The plaintiff society, being an organized society within the meaning of r. 2 (1.), applied for admission and was duly admitted into the Federation as a member thereof.

On December 11, 1919, the National Conference passed the following resolution: "That the Districts be asked whether they were in favour of forming a National Joint Conciliation Committee, with a new constitution to meet the existing circumstances and conditions of the trade in the place of the present Wages and Conciliation Committee." It appeared that the plaintiff society, which was the trade union for the Glasgow District, had a separate Wages Board or Conciliation Committee, which the workers in that District preferred to the proposed new joint committee.

On March 27, 1920, the Glasgow District met to consider the proposal and passed a resolution that "we do not take any vote on this question seeing the Glasgow Wages Board is satisfactory to us." That resolution having been conveyed to the National Conference that body, on April 24, 1920, passed the following resolution: "That this Conference after carefully considering the position of the Glasgow District is agreed that by openly and defiantly refusing to carry out the National Conference resolutions the Glasgow District automatically forfeits its membership with the National Federation according to Rule 7, clause 2 of the Constitution."

The plaintiff society then brought this action claiming a declaration that the resolution passed by the National Conference of the defendant Federation on April 24, 1920, was void and ultra vires and not binding on the plaintiff society, and that the plaintiff society were and had been at all times since the said resolution a constituent part of the defendant society; and an injunction restraining the defendants from acting upon the said resolution. The defendants contended that under s. 4, sub-s. 4, of the Trade Union Act, 1871, the Court had no jurisdiction to entertain the action. (1)

(1) The Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 3, provides: "The purposes of any trade union shall not, by reason merely that they

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Peterson J. held, (1.) that the action was brought for the purpose of directly enforcing the agreement between the plaintiff society and the defendant society whereby the plaintiff society became a member of the defendant society; and (2.) that inasmuch as the rules of the defendant society contained regulations in restraint of trade the agreement whereby the plaintiff society became a member of the defendant society could not, apart from the Act of 1871, have been enforced at common law. On these grounds he dismissed the action.

The plaintiff society appealed.

Montgomery K.C. and *Slesser* for the appellants. This is not an action brought with the object of directly enforcing any agreement between one trade union and another: *Wolfe* v. *Matthews* (1); *Yorkshire Miners Association* v. *Howden* (2); *Osborne* v. *Amalgamated Society of Railway Servants* (3); *Cope* v. *Crossingham.* (4)

[LORD STERNDALE M.R. Is not an action for an injunction to restrain the breach of an agreement an action brought to enforce the agreement?]

Not when the injunction is merely subsidiary. At any rate the Court may grant a declaration that upon a proper interpretation of the rules the Glasgow District remained a constituent member of the National Federation.

Sect. 4, sub-s. 4, of the Trade Union Act, 1871, contemplates an agreement between two trade unions independent of each other. A contract whereby one trade union becomes a member of another is not an agreement between one trade union and another within the sub-section. As a matter of law one unincorporated trade union cannot be a member of

are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

Sect. 4 provides: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, ... 4. Any agreement made between one trade union and another."

(1) (1882) 21 Ch. D. 194.
(2) [1905] A. C. 256.
(3) [1911] 1 Ch. 540.
(4) [1909] 2 Ch. 148.

another. The agreement (if any) here is between the individual members of the plaintiff society and the Federation. An agreement as to wages between an employers' association and a trade union would be "an agreement between one trade union and another" within the sub-section. Here it is the individual members of the plaintiff society who are members of the Federation, and not the plaintiff society itself.

Manning K.C. and *A. Clement Edwards* for the respondents. This action is brought to enforce the agreement of membership between the two trade unions. The relation between the parties to the action is contractual. The Federation is a combination of individual unions. It differs from an amalgamation. Each district association retains its autonomy: r. 11. In case of amalgamation that would not be so. The rules are inconsistent with the view that the individual members of the District are members of the Federation; they are consistent, on the other hand, with the view that the Districts themselves are the constituent members of the Federation.

A registered trade union is a legal entity: per Farwell L.J. in *Osborne* v. *Amalgamated Society of Railway Servants.* (1)

[LORD STERNDALE M.R. referred to what was said by Lord Brampton in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants.* (2)]

Montgomery K.C. in reply. The Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30), s. 3, sub-s. 5, provides that the provisions of the Act as to the application of the funds of a union for political purposes shall apply to a union which is in whole or in part an association or combination of other unions as if the individual members of the component unions were the members of that union and not the unions. That seems to imply that one trade union may be a member of another.

LORD STERNDALE M.R. [after stating the facts and describing the nature of the action:] That is an action by the plaintiff society claiming that the defendant Federation cannot exclude the plaintiff society from what is variously called "membership," "right of affiliation," or "constituting

(1) [1909] 1 Ch. 163, 191. (2) [1901] A. C. 426, 442.

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a constituent part of the Federation." It is a claim that the plaintiff trade union shall be retained as a member of an affiliated body, or a constituent part of the National Federation, and it is not a claim by individual members of the plaintiff society that they may be declared to be members of the National Federation. I think there is no question about that upon the statement of claim. If there were any doubt it would be removed by the opening of the learned counsel before Peterson J. He said that both the plaintiffs and the defendants were unregistered trade unions—not individual members of trade unions—and that the action was brought by various persons in a representative action, which is defended similarly in a representative action; and the case proceeded on that basis from start to finish before Peterson J. Before us it has been argued, in face of difficulties that arise if the plaintiffs are to be taken as the plaintiff society, that this is not an action by them as a trade union at all; it is an action, they say, by the individual members of the plaintiff society to restrain the defendants, the National Federation, from excluding them, the individual members, from the rights to which they as individual members of the defendant Federation are entitled. That point was taken in this Court for the first time in the address of junior counsel for the appellants. It looks very like an afterthought; at any rate it was not raised before Peterson J. at all. Whether it can be raised now, or whether, if it can be raised, there is anything whatever to support it, I shall deal with presently, but for the moment I shall deal with the matter on the basis on which it was dealt with before Peterson J.—namely, a claim by the plaintiff society, as a society, against the defendant Federation as a Federation. On that Peterson J., without giving any decision or expressing any opinion upon the merits of the case, has decided that it is an action which the Court cannot deal with, because it is, by s. 4 of the Trade Union Act, 1871, excluded from the consideration of the Court. Treating the case on that basis, in the first place in order to ascertain whether the action is excluded from the jurisdiction of the Court, it is necessary to see whether the

defendant Federation is an illegal association in the sense that it is in restraint of trade. Peterson J. has held that it is. I agree with him, and for the reason that he has given. I think it was a trade union the rules of which, and many of the objects of which—at any rate one of the objects of which, is in restraint of trade.

It is necessary now to turn to the Trade Union Act of 1871. [His Lordship referred to the material sections and continued:] The question here is whether this is an action brought directly to enforce an agreement which comes within sub-s. 4 of s. 4: "Any agreement made between one trade union and another." That it is brought directly to enforce an agreement of some sort is in my opinion quite clear. I cannot see a much more direct way of enforcing an agreement than by an injunction to prevent a person from breaking it, and if an injunction to prevent a person from breaking an agreement is claimed, in my opinion that is an action brought directly to enforce that agreement.

Now was this an agreeement between one trade union and another, if there was any agreement at all? It is admitted by counsel for the appellants that if this be an action by the plaintiff society as a society (and that is the basis on which I am dealing with it at the moment) the claim must arise out of a contract, and out of a contract by the plaintiff society with the defendant society. That, if it exist, must be an agreement between one trade union and another within the meaning of this sub-section. The agreement, if it exist, is an agreement that the plaintiff society should be a member of the defendant Federation upon the terms of the rules.

Some doubt has been suggested, and I express no opinion upon it, whether it is possible for one trade union to be a member of another. But the Trade Union Act of 1913 shows that the law does contemplate—at any rate it did in 1913—that one trade union might be a member of another. In that case sub-ss. 1, 2 and 3 of s. 4 might, in respect of the subject-matter to which they relate, deal with members of a trade union who are also trade unions themselves, and might prevent the Court, in the circumstances dealt with

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in those three sub-sections, from in any way securing to trade unions, who are also members of trade unions, the rights which they would acquire as such members. I will assume that "member" in 1, 2 and 3, though I by no means decide that it does, will include member of a trade union which is also a trade union itself; but I can see no argument derived from that which obliges me to say that therefore an agreement of membership between one trade union and another is not within sub-s. 4. The words are as wide as they can be: "Any agreement." I am not going to discuss whether it is possible to put any limitation, or if so what limitation, upon those words "Any agreement." That point may arise for discussion hereafter and I reserve any opinion until it does arise; but I am clearly of opinion that the limitation which the appellants seek to read into it—namely, "any agreement made between one Trade Union and another except an agreement of membership of the one Trade Union in another" cannot be read into it. I can see no ground for that at all, and therefore this agreement, if it did exist, was in my opinion within sub-s. 4 of s. 4. I have had considerable difficulty in seeing exactly where, when and how the agreement was made. In my opinion what took place was this, and the evidence, indeed, shows it; there had been two Federations before this Federation was formed. The plaintiffs and Lancashire belonged to one Federation; a number of other Districts belonged to another, and the two Federations were not working together so well as many people thought they ought to do. Therefore this new Federation (the defendant Federation) came into existence in 1918, to include all the Districts that had been in both of the other Federations, and to work all together harmoniously. That agreement to form this Federation, into which all the Districts would come, was an agreement between the Districts inter se and was not an agreement with the defendant Federation, which was not at that time in existence. But when the Federation did come into existence, and when these Districts became members of the Federation and continued from year to year to pay their contributions, and to fulfil their liabilities as members

of the Federation, it may be that there then arose an implied contract by the plaintiffs and the other constituent parts or members of the Federation to do their duty under the rules, and on the other side an agreement by the defendant Federation to retain them, and allow them to remain and enjoy their privileges and benefits as members, so long as they observed the rules; and I think that such is the agreement which Peterson J. has found. I do not differ from him in his finding of such an agreement. But that clearly in my opinion, as I have already said, is an agreement which comes within sub-s. 4, as an agreement between one trade union and another. If the plaintiffs' case rested upon that, and it seems to me that is the only agreement upon which it can rest, then the Court cannot, as Peterson J. said, consider the action because it is an agreement between one trade union and another. If such an agreement cannot be inferred from the facts, and from what took place after the defendant Federation came into existence, then there is no contract at all, and the plaintiff society have no right arising out of any contract at all; they have no right which does not arise out of contract, and therefore it seems to me they are in a complete dilemma; either they have a contract with the defendants by which the defendants are bound to retain them as members of the Federation, in which case it comes within sub-s. 4, or they have no contract at all, in which case they have no right whatever in the action. Therefore on the basis on which Peterson J. decided the action, in my opinion he was quite right. But then, at a very late stage of the argument for the appellants, it was attempted before us to set up another contention which was not before him, and I propose to deal with it. The argument is that this is not an action by the plaintiff society as a society at all. The plaintiff society, it is said, is merely a name for the individual members of the Glasgow District Society, and those individual members are the plaintiffs in this case, and they are the people who have to show a contract of membership of the National Federation, and when they show that then they do not show an agreement between one trade union and another, but an agreement

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between certain individuals, who are described under the collective name of the plaintiff society, and the defendant Federation. In my opinion the plaintiffs ought not to be allowed to raise that question here at all. This Court should be quite firm in refusing to have raised before it a contention which was not only not raised before the judge in the Court of first instance, but which, if it had been raised, would have given rise to issues of fact which were not presented to him, would have required an amendment of the pleadings, and the giving of evidence that was not given before him ; and, if it rested with me, I should be content to say that the appellants cannot raise that point here. But I do not propose to dispose of it upon that ground, because I think there is nothing in the point. [His Lordship referred to the rules and continued :] In my opinion there is nothing whatever in these rules to show that it was ever contemplated that the individual members of the District should be members of the National Federation. As I have said it would require evidence to show that they were—evidence from which a contract might be inferred between the individual members of the plaintiff society and the National Federation. No such evidence was given. The point was never thought of, and if it had been, I think it could not have succeeded. The appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. This action was brought for the purpose of obtaining a declaration that a certain resolution passed by the defendant Federation was ultra vires and illegal, and an injunction to restrain the Federation from acting upon it. Peterson J., having first decided that the objects of the Federation were illegal because they were in restraint of trade, has secondly come to the conclusion that the object of the action was directly to enforce an agreement between one trade union and another, and therefore was one which the Trade Union Act, 1871, did not enable the Court to entertain, and on that ground has dismissed the action.

It is important for this purpose to see how the plaintiffs'

claim was framed, and how the action was presented to Peterson J. The statement of claim describes the plaintiffs as "The Secretary, President, Vice-President, Treasurer and Trustees" (having given their names in each case) "on behalf of themselves and all other members of the Glasgow and District Glass Bottle Makers' Trade Protection Society, hereinafter called the Plaintiff Society" as plaintiffs. It describes the defendants (giving their names again as before) as "The President, Secretary, and Trustees, on behalf of themselves and all other members of the National Federation of Glass Bottle Workers hereinafter called the Defendant Society," as defendants. It then alleges that the plaintiff society (repeating its name) is an unregistered trade union. It alleges that the National Federation, the defendant society, is a Federation of Trade Unions of the Glass Bottle Workers, to which the plaintiff society was at all material times affiliated, and of which the plaintiff society is a part. It then alleges that the plaintiff society has paid subscriptions, and so forth, to the defendant society, and is entitled to various benefits and rights arising out of such affiliation. It then states the facts culminating in a resolution arrived at by the Federation to the effect that, owing to the circumstances specified therein, the plaintiff society forfeits its membership in the Federation according to r. 7, clause 2, of the constitution. Then the plaintiffs allege that the defendant society had no power under its rules to cause them to forfeit their membership; it asks for the declaration to which I have already referred—namely, that the resolution was ultra vires, not binding upon the plaintiff society, and that they are and have been at all times since the resolution a constituent part of the Federation; and then an injunction restraining the defendants from acting on their resolution.

Now can there be any possible question that that action is founded on an alleged agreement between the plaintiff society, alleged to be a trade union, and the defendant Federation, alleged to be a trade union? I quite agree that the plaintiffs do not in so many words say that the Federation is a trade union, but there is no question about the fact, and it was so

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dealt with before Peterson J. It seems to me quite plain that the action is founded on an alleged agreement between one trade union and another. If that is so it is necessary to look at the Act of 1871, upon which Peterson J. has decided that the action cannot be maintained. That Act provides in s. 3 that "The purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

If it had stood there the impediment which had previously existed against the enforcing of agreements by or with a trade union—namely, the illegality of the purposes of the union, would have been removed, and there would have been no objection to the enforcing of any such agreement. But s. 4 limits what would have been a more extensive effect of s. 3, and it provides that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements," and included in those is (4.) "Any agreement made between one Trade Union and another." Peterson J. has held, in the first place, that the objects of the defendant Federation are illegal as being in restraint of trade, and it is therefore one of those societies with regard to whose agreements s. 3 of the Act was necessary in order that they might be enforced by legal proceedings; and, if that is so then any agreement with such a body cannot now be enforced if it comes within the description of any of the contracts mentioned in s. 4. As I have already said, as the action was originally launched it is quite clear that the contract alleged was one between one trade union and another trade union, falling within the description in sub-s. 4, and in that case that being so, it seems to me that Peterson J. had no option but to hold that the action could not be entertained and must be dismissed.

But it was suggested in this Court that an agreement under which one trade union could be a member of another trade union was a legal impossibility; that there could not be such an agreement. I think there are two answers to that. The

first is that the Act of 1871 recognizes the possibility of one trade union making an agreement with another trade union, and does not exclude from that recognition any particular agreements, and it seems to me that we must come to the conclusion on this point that there is nothing impossible in law in an agreement between one trade union and another, under which the one shall be a member of the other; but if anything were required to remove any doubt on that subject I think it is afforded by the Trade Union Act of 1913, which clearly recognizes that one trade union may be a combination of a number of other trade unions. Therefore on the action as originally started, and as it was presented to Peterson J., and as, until the address of the junior counsel for the appellants, it was addressed to us, the decision of Peterson J. in my opinion was clearly right.

But, as I have said before, it was attempted at a late stage to place the action upon a different footing altogether, and to say that this was not a representative action brought by individuals on behalf of the society against other individuals as representatives of another society, but that it was an action brought by a number of individuals on their own account, claiming to be members in their individual capacity of the defendant Federation, and claiming to restrain the defendant Federation from excluding them as individuals from membership of the Federation. That is an entirely fresh case, and I desire to associate myself strongly with what the Master of the Rolls has said on that subject: that this Court ought to be firm in its refusal to entertain, or to allow to be presented to it, a case which might have been raised in the Court below, and which if so raised would have given rise to different issues of fact, and to different considerations altogether from those which were presented to the Court below, and to raise which in this Court would mean a complete re-trial, on different materials, of the action as previously presented. But even if the plaintiffs had been allowed to raise that new case in this Court, in my opinion there would have been nothing in it. I have carefully considered the rules, and although they are perhaps inaccurately

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drawn, if there is one thing more clear about them than another, it is that what their framers contemplated was that the Federation should consist of a number of so-called Districts; that is to say, of a number of trade unions representing workmen in the Districts, and that those trade unions were to be the members of the Federation. I think that wherever the word "member" is used in the rules it is used in such a context that it clearly means a member of the District, that is to say a member of the affiliated District and not a member of the Federation; and wherever the "Districts" are referred to, they are referred to as the constituent parts of the Federation.

For these reasons I am of opinion that the judgment of Peterson J. was right and must be affirmed, and the appeal dismissed with costs.

YOUNGER L.J. I am of the same opinion. There can be no doubt that the National Federation of Glass Bottle Workers to which I shall refer as "The National Union" is a trade union, one or more of whose objects or purposes is in restraint of trade, and I think, on the fair reading of the statement of claim in this action, that it is framed upon the footing that the District Unions—and the Glasgow District I will call "The Glasgow Union"—are the constituent members of the National Union and that the individual members of the Districts do not stand towards the National Union in the relation of member and union. Further I think that that is the only position that can be successfully maintained, because it appears to me, upon the true construction of the rules of the National Union, that the only members of that union recognized by its rules are the Districts referred to in the rules, and that the only contracts of membership with the National Union under the rules are contracts by each District Union (in this case the Glasgow Union) with the National Union. Such a contract of membership on the part of one trade union with another may or may not be possible in law. I confess that apart from the Act of 1913 I should have doubted whether such a contract was

contemplated by the Act of 1871, or of 1876, or would occur to a lawyer as permissible. But it may well be that the Act of 1913, in a case where the point definitely arises for decision, would require the Court to say that one trade union may be a member of another trade union, just as much as an individual may be a member of such a union. If however such a contract is permissible, and if there is such a contract of membership here, then the question arises whether that is a contract or agreement between one trade union and another within s. 4, sub-s. 4, of the Act of 1871. Now my view of s. 4 is this, that whether or not membership of one union on the part of another is contemplated or covered by sub-ss. 1, 2 or 3 of s. 4, there is no ground on which it is permissible so to qualify the comprehensive language of sub-s. 4 as to exclude such a contract of membership from the operation of the sub-section.

This action for a declaration followed by an appropriate injunction is, I cannot doubt, an action which was instituted with the object of directly enforcing the agreement of membership. It asks, and it is hoped as a result of success in the action, that the existence of the membership of the Glasgow Union shall be declared and recognized by the Court as existing to-day, and it appears to me that s. 4 of the Act precludes the Court from entertaining, in the circumstances which I have set forth, any such proceedings. It was, however, suggested, and this perhaps was the main contention of counsel for the appellants, that although there might be a difficulty in asking the Court to grant any injunction it was quite permissible and proper for the Court to make a declaration to the effect that the Glasgow District remained a constituent member of the National Union, and that that declaration would be proper for the Court to make, provided that no relief consequent upon it were given. Speaking for myself I doubt whether, even if the objection to the declaration were not taken by the defendant, it would be permissible for the Court to make a declaration in the case of an agreement, which, being between one trade union and another, is by s. 4 of the Act declared to be one that cannot be directly

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enforced, or otherwise recognized for the purpose of recovering damages, by any Court; but whether that be so or not it appears to me clear that if, as is said in this case by the respondents, they repudiate all legal liability under the agreement sued upon then it would, I think, be improper in relation to an agreement, the binding effect and force of which is repudiated by the defendants, that the Court should condescend to make any declaration at all. It follows therefore in my judgment, and for these reasons, that the judgment of the learned judge was quite correct and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Mills, Lockyer, Mills & Evill.*
Solicitor for the respondents: *G. A. Herbert, for A. Willey, Leeds.*

G. A. S.

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In re AINSWORTH.

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[1921. A. 1082.]

Will—Advances—Direction for Deduction of Debt from Share—Intention to produce Equality between Legatees—Receipt of Dividend in Liquidation by Arrangement of Affairs of Legatee.

Where, with the dominant intention of producing equality between legatees, a testator directed that a debt due from his son should be deducted from the moiety of his residuary estate bequeathed to trustees upon trust for the benefit of the son and his children, and subsequently in the liquidation of his son's affairs by arrangement received a dividend on the debt, the direction as to the deduction of the debt from the moiety bequeathed for the benefit of the son and his children becomes operative on the death of the testator to the extent of the balance of the debt which remained due, notwithstanding that under the bankruptcy laws the son was released from his indebtedness to the testator.

The testator by his will dated November 29, 1873, directed his trustees to stand possessed of his residuary trust funds after the decease of his widow as to one equal moiety in trust to pay the income to his son Richard during his life And after his decease for his wife during her life And on her

death as to the capital for the children of his son, and the testator declared similar trusts of the other moiety for his daughter her husband and their children and he directed that the interest to accrue on the promissory note for 600*l.* which he held of his son should be deducted from his moiety of the rents and interest of the trust funds and that the principal should be allowed out of the residuary trust funds bequeathed to the children of his son. By a codicil dated November 18, 1874, the testator after stating that he had, since the date of his will, paid for his son a further sum of 200*l.* making in all 800*l.*, directed that the interest on the 800*l.* during the life of his son should in the first place be deducted by his trustees from the moiety of the rents and interest bequeathed to his son by his will and that the principal sum of 800*l.* should also be deducted out of the share of his residuary trust funds bequeathed to the children of his son. On November 23, 1874, the son filed a petition under s. 125 of the Bankruptcy Act, 1869, and in the liquidation by arrangement the testator proved for the 600*l.* secured by the promissory note, and on May 15, 1875, a certificate of discharge was given to the son, thereby releasing him from all his indebtedness to the testator. The testator received a dividend of 3*d.* in the £ in the liquidation by arrangement of his son's affairs amounting to 7*l.* 10*s.* and died on March 25, 1876. This summons was issued to determine whether the directions contained in the codicil as to the 800*l.* and interest ever became operative:—

Held, that the intention of the testator being to produce equality between the shares of the residuary legatees the directions in the codicil as to the 800*l.* and interest became operative on the death of the testator except to the extent of the sum received by him in the liquidation by arrangement of his son's affairs.

ORIGINATING SUMMONS.

The testator Richard Ainsworth made his will on November 29, 1873, and thereby directed his trustees to stand possessed of his residuary trust funds after the decease of his widow (which event happened on July 4, 1889) as to one equal moiety thereof in trust for his son Richard Ainsworth during his life And after his decease in trust for his wife Mary Elizabeth Jane Ainsworth during her life And after her decease in trust for the children of Richard Ainsworth who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares And as to the other equal moiety in trust for the testator's daughter Elizabeth Godwin Davis during her life And after her decease in trust for her husband James Davis during his life And after his decease in trust for the children of Elizabeth Godwin Davis who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal

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shares. And the testator directed that the interest to accrue on the promissory note for 600*l.* which he held of his son Richard Ainsworth should be deducted from his moiety of the rents, dividends and interest and that the principal should be allowed out of the residuary trust funds bequeathed to his son's children. By a codicil dated November 18, 1874, the testator, after reciting that since the date and execution of his will he had paid to or for his son Richard Ainsworth the further sum of 200*l.*, making in all 800*l.*, directed that the interest to accrue due on the sum of 800*l.* during the life of his son after the rate of 5*l.* per cent. per annum should in the first place be deducted by his trustees and executors from and out of the moiety of the rents, interest and dividends bequeathed to his son by his will and that the principal sum of 800*l.* should also be allowed and deducted out of the share of his residuary trust funds bequeathed to the children of his son Richard Ainsworth by his will. The testator died on March 25, 1876. The testator's son Richard Ainsworth died on July 16, 1892, leaving his widow Mary Elizabeth Jane Ainsworth and several children him surviving. The testator's daughter Elizabeth Godwin Davis survived her husband and died on February 18, 1920, leaving several children her surviving.

The facts as to the advances made by the testator to or for the benefit of his son Richard Ainsworth are as follows :—

In the months of July and August, 1873, the testator advanced to his son various sums of cash amounting in the aggregate to the sum of 750*l.* As against these advances the testator set off the sum of 150*l.* in respect of a sum of 100*l.* and interest which he had received on behalf of his son and took a promissory note from his son dated August 15, 1873, for 600*l.* and interest at 5*l.* per cent. per annum for the balance. In the month of November, 1874, William Edward Perham, a solicitor, on the instructions of the testator paid certain debts owing by the son. The sums disbursed by Mr. Perham on behalf of the testator in payment of the son's debts up to and including November 23, 1874, amounted to 202*l.* 2*s.* 2*d.* There was no evidence to show whether such payments were made at the request of the son so as to

constitute the relationship of debtor and creditor as between the son and the testator, or whether such payments were made by the testator of his own volition in order to save if possible the family reputation. His Lordship was satisfied that the sum of 200*l.* mentioned in the codicil was intended to refer to the payments made by Mr. Perham as before mentioned.

On November 23, 1874, the testator's son Richard Ainsworth filed a petition in the Bristol County Court under s. 125 of the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement. On December 17, 1874, a special resolution was duly passed by the statutory majority of the creditors of Richard Ainsworth for the liquidation of his affairs by arrangement and for the appointment of a trustee, which appointment was duly certified by the Registrar on December 24, 1874. In this liquidation the testator proved, and was admitted as a creditor, for the sum of 600*l.* secured by the promissory note dated August 15, 1873. The testator did not prove for the sums which he had applied in payment of his son's debts in November, 1874. By a special resolution duly passed on May 12, 1875, by the creditors in general meeting it was (inter alia) resolved that the discharge of Richard Ainsworth be granted; that a first and final dividend of 3*d.* in the £ be declared; that the close of the liquidation should take place as and from June 1, 1875; and that the trustee be released as from that date. On May 15, 1875, the Registrar gave his certificate of the discharge of Richard Ainsworth, the effect of which, under the Bankruptcy Act, 1869, was to release Richard Ainsworth from the whole of his indebtedness to the testator. On May 21, 1875, the testator received a dividend of 3*d.* in the £ on the 600*l.*, amounting to the sum of 7*l.* 10*s.*

From the date of the testator's death little or no income was produced by the trust estate and no payments were made to the son during his life or after his death to his widow; but the only remaining asset, a warehouse in Bristol, on July 29, 1920, was sold for 7650*l.*

The plaintiffs are the present trustees of the testator's

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will and codicil and the respondents are the widow of the testator's son and her three children and the widow of a fourth child who died intestate on March 5, 1919. The remaining seven respondents are the children of the testator's daughter Elizabeth Godwin Davis deceased. The trustees of the testator's will took out this summons to determine whether owing to the liquidation by arrangement of the affairs of the testator's son in the lifetime of the testator and the acceptance by the testator after the date of his codicil of the sum of 7*l.* 10*s.* by way of dividend in respect of the 600*l.* due to him from his son under the promissory note, (1.) the direction in the codicil that the sum of 800*l.* should be allowed and deducted out of the residuary trust funds was left wholly unaffected, or (2.) that direction was affected only to the extent that the sum of 800*l.* was pro tanto reduced and whether interest on the 792*l.* 10*s.* ought to be deducted from the income now payable to the son's widow.

Jenkins K.C. and *J. F. Carr* for the plaintiffs, stated the facts.

Ward Coldridge K.C. and *Swords* for the defendants, the son's widow and children. The sum of 800*l.* referred to in the codicil as a debt due from the testator's son was in fact at the date of the testator's death no longer owed to the testator by his son by reason of the testator receiving a dividend during his lifetime in his son's liquidation of his affairs by arrangement under s. 125 of the Bankruptcy Act, 1869, and the certificate of discharge obtained by the son on May 15, 1875, prior to the death of the testator. In these circumstances the effect of ss. 31, 49, 125, sub-ss. 7 and 10, of the Bankruptcy Act, 1869, was to release the son from the whole of his indebtedness to the testator. That being so the directions contained in the codicil as to the 800*l.* and interest were rendered wholly inoperative, and even if they did become operative the words used in the codicil clearly did not extend to the deduction of the interest on the 800*l.* from the income of the moiety now payable to the son's widow.

That in such circumstances the directions in the codicil are inoperative: see *Golds* v. *Greenfield* (1) and *Silverside* v. *Silverside*. (2) The Court is not precluded from so holding by the decision in *Auster* v. *Powell* (3), as that decision was with regard to a will of an entirely different nature.

Owen Thompson K.C. and *Dighton Pollock* for the children of the testator's daughter. The 800*l.* must be brought into hotchpot. The receipt of a dividend by the testator in the liquidation by arrangement of his son's affairs ought to be treated merely as a pro tanto payment of the money owing, and the clause in the codicil as to the deduction of the 800*l.* and interest remained operative as to the balance, otherwise the dominant intention of the testator to produce equality in the amount of the benefits which his son and daughter should respectively receive under his will would be frustrated. The effect of the directions as to the 800*l.* and interest is to compel the son during his lifetime to bring interest into hotchpot in ascertaining the income of the moiety of the residuary trust fund bequeathed to him and to compel the son's children to bring the capital sum of 800*l.* into hotchpot in ascertaining the capital of the moiety of the residuary trust funds bequeathed to them. The statement in the codicil as to the amount payable by the son cannot be disputed by the legatees: *In re Aird's Estate* (4); *Smith* v. *Conder*. (5) The interlocutory observation of Sir John Romilly made during the argument in *Silverside* v. *Silverside* (2) is wrong. I rely upon the decision in *Auster* v. *Powell* (3) that the receipt of a dividend by the testator under the bankruptcy of a legatee ought to be treated merely as a pro tanto payment of the money advanced and that the hotchpot clause remained operative as to the balance.

Ward Coldridge K.C. in reply. The consequence of the testator's participation in his son's liquidation was to destroy the debt due to him, and as no interest was in consequence due from his son he therefore in that way expunged the

(1) (1854) 2 Sm. & Giff. 476.
(2) (1858) 25 Beav. 340, 341.
(3) (1863) 1 D. J. & S. 99.
(4) (1879) 12 Ch. D. 291.
(5) (1878) 9 Ch. D. 170.

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direction in his codicil which dealt only with certain interest due on a promissory note. The suggestion that the testator intended to effect equality between the residuary legatees is answered by reason of the fact that the testator could have quite easily made another codicil and provided for the event which had happened.

Oct. 25. P. O. LAWRENCE J. read the following written judgment: The question now arises whether the directions contained in the codicil as to the 800*l.* and interest ever became operative, and if so what is the true meaning and effect of such directions. Counsel on behalf of the son's widow and children contends that the effect of the son's release from his indebtedness to the testator in the latter's lifetime was to render altogether inoperative the directions contained in the codicil as to the 800*l.* and interest, and further that if contrary to his contention such directions did become operative they did not extend to the deduction of the interest on the 800*l.* from the income now payable to the son's widow. In my opinion the questions thus raised are not free from difficulty. It cannot, I think, be doubted that the dominant intention of the testator appearing from his will and codicil was to bring about equality in the amount of the benefits which his son and his daughter respectively should receive from him. It is beyond dispute that the effect of these directions speaking broadly is to compel the son during his lifetime to bring interest at the rate of 5 per centum per annum into hotchpot in ascertaining the income of the moiety of the residuary trust funds bequeathed to him, and to compel the son's children to bring the capital of the 800*l.* into hotchpot in ascertaining the capital of the moiety of the residuary trust funds bequeathed to them.

Bearing in mind the object which the testator had in view, I am of opinion that, except to the extent of the 7*l.* 10*s.* which the testator received during his lifetime, the directions of the codicil became operative at his death notwithstanding that by operation of law the son had been released from his

indebtedness to the testator during the testator's lifetime. There is nothing in my opinion in the codicil to indicate that the directions in question were to be dependent upon the relationship of debtor and creditor continuing up to the time of the testator's death. Moreover it is by no means clear that that relationship ever existed as to the 200*l.* referred to in the codicil. It is true that in the will the 600*l.* is referred to as owing on the promissory note, but in the codicil the 800*l.* is spoken of as the total sum which the testator had paid to or for the son and the direction is specific that the interest and principal of that total sum of 800*l.* is to be deducted out of the income and capital of the son's settled share. In my opinion, nothing short of repayment of the total amount mentioned in the codicil would prevent the directions from becoming operative. The cesser in the testator's lifetime of the relationship of debtor and creditor does not in my opinion cause the directions to become inoperative, as it does not in any way affect the object with which the testator inserted the directions. Further it is to be noted that the testator did not after the liquidation alter or revoke the directions contained in his codicil although he had ample time to do so. I have been referred to *Silverside* v. *Silverside* (1), and especially to the observation reported to have been made by Sir John Romilly during the argument. I do not consider that this observation precludes me from deciding the present case in accordance with the view I have expressed. In the first place the passage relied upon is merely an interlocutory observation, and in the next place the words of the will in that case differ from those contained in the will in the present case. Moreover so far as I can gather from the report the only point decided by the learned judge in that case was that the son's life interest alone was charged with the amount advanced to him.

Auster v. *Powell* (2) is an authority in favour of the view I have expressed if and so far as any case dealing with a differently worded will can be said to be an authority governing the case I have to decide. There Lord Westbury

(1) 25 Beav. 340, 341. (2) 1 D. J. & S. 99, 106.

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held that the receipt of a dividend by the testator under the bankruptcy of the son ought to be treated merely as a pro tanto payment of the money advanced and that the hotchpot clause remained operative as to the balance.

On the whole therefore I have come to the conclusion that the authorities do not prevent me from holding that the directions contained in the codicil of the testator became operative notwithstanding that the son had been released from his indebtedness to the testator by virtue of the liquidation proceedings. The sum of 800*l.* must however be reduced by the sum of 7*l.* 10*s.* received by the testator by way of dividend.

There remains the question whether interest on the sum of 792*l.* 10*s.* at the rate of 5 per cent. or at any other rate ought to be deducted from the income now payable to Richard Ainsworth's widow. In my opinion the language of the codicil does not warrant such a deduction. The 800*l.* was not bearing interest at the death of the testator, and the only direction to be found in the codicil is that interest at 5 per cent. per annum is to be deducted from and out of Richard Ainsworth's share of income during his life. There is no further direction as to any interest, and the principal alone is directed to be deducted from the children's share of capital.

In these circumstances, I am of opinion that on the true construction of the codicil no interest is chargeable on the 792*l.* 10*s.* during the lifetime of Richard's widow.

There will be a declaration in accordance with my decision, and the costs of all parties as between solicitor and client will be retained and paid out of the capital of the testator's residuary estate.

Solicitors for the plaintiffs and the respondents, the children of the daughter: *Robbins, Olivey & Lake, for Abbot, Pope & Abbot, Bristol.*

Solicitors for the respondents, the son's widow and children: *Guscotte, Wadham, Tickell & Co., for J. H. King, Bristol.*

G. P. L.

ASTBURY J.

1921

Oct. 27.

In re BIEDERMANN.

BEST *v.* WERTHEIM.

[1921. B. 4278.]

Will—Life Annuity—Forfeiture—Event—"Voluntarily or involuntarily alienate or encumber"—Charge created by Paramount Power—Austrian National—Treaty of Peace (Austria) Order, 1920.

By his will dated March 31, 1911, a testator bequeathed an annuity of 250*l.* to an Austrian national "until he shall die or voluntarily or involuntarily alienate or encumber . . . . the same."

The testator died on August 22, 1914, during the war. The annuity was therefore accumulated in the hands of his legal personal representative, who made the proper returns to the custodian under the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 3, but no vesting order was made under s. 4.

By the Treaty of Peace (Austria) Order, 1920, the annuity and its accumulations were, as from July 16, 1920, charged in favour of the Administrator of Austrian Property, to secure (inter alia) payment of debts owing by Austrian to British nationals:—

Held, following *In re Levinstein* [1921] 2 Ch. 251, that the accumulations up to July 16, 1920, passed to the Administrator of Austrian Property.

Held, also, that the charge created by the Treaty of Peace Order was not an involuntary alienation or encumbrance within the meaning of the will, so that the current annuity since July 16, 1920, was not forfeited, but was payable to the Administrator of Austrian Property.

ORIGINATING SUMMONS.

By his will dated March 31, 1911, a testator made (inter alia) the following bequest: "I give to my nephew Ernst Wertheim of Vienna an annuity of 250*l.* free of legacy duty payable quarterly out of the income of my estate until he shall die or voluntarily or involuntarily alienate or encumber or attempt or affect to alienate or encumber the same or some part thereof but no longer."

The testator made two codicils on October 14, 1913, and December 5, 1913, which are not material, and died on August 22, 1914.

In November, 1914, administration with the will annexed was granted to the testator's widow, the executors having renounced probate. The widow died on October 4, 1917,

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and on December 5, 1917, administration de bonis non was granted to the plaintiff.

The annuitant being an Austrian subject resident in Vienna the annuity was not paid, but the amount was accumulated in the hands of the legal personal representative, who made the proper returns to the custodian under the Trading with the Enemy Amendment Act, 1914, s. 3, but no vesting order was made under s. 4.

On August 13, 1920, the Treaty of Peace (Austria) Order, 1920 (St. R. & O. 1920, vol. ii., p. 426), was passed under the powers of the Treaties of Peace (Austria and Bulgaria) Act, 1920 (10 & 11 Geo. 5, c. 6), and the annuity and the accumulations were thereby charged in favour of the Administrator of Austrian Property, as from July 16, 1920, the date of the Austrian Peace Treaty. The charge given by clause 1 (ix.) (loc. cit., pp. 428, 434) was to secure (inter alia) payment of debts owing by Austrian to British nationals, with a corresponding right of Austrian nationals to compensation against Austria under art. 249 (*j*) of the Treaty (loc. cit., p. 442).

On August 5, 1921, the plaintiff issued this summons to determine (*a*) whether the annuity had been forfeited or was still payable; (*b*) to whom the accumulations up to July 16, 1920, belonged; (*c*) to whom the annuity since that date was payable.

Watt Dollar for the plaintiff.

Myles for the annuitant. There was clearly no forfeiture till the charge was created and therefore the accumulations up to July 16, 1920, pass to the Administrator of Austrian Property: *In re Levinstein.* (1)

Again, the current annuity is not forfeited. The words "involuntarily alienate or encumber" point to some alienation or charge for which the annuitant is in some sense responsible and which he could have avoided—e.g., if he incurs debts and does not pay them he may be made bankrupt. That would be an involuntary alienation due to his own

(1) [1921] 2 Ch. 251.

acts and defaults, and there would be a forfeiture. But a divesting charge by a paramount power for which the annuitant is in no conceivable sense responsible is not within the clause at all.

The cases on voluntary and involuntary alienation are collected in *Avison* v. *Holmes*. (1) See also Jarman on Wills, 6th ed., p. 1500, and *Lear* v. *Leggett*. (2)

Bischoff for the residuary legatees. In this Court I cannot question *In re Levinstein* (3) and must therefore admit that the accumulations go to the Administrator of Austrian Property.

In that case it was also held that the current annuity was forfeited by the charge created by the Peace Order, the words being quite clear. The present words "voluntarily or involuntarily alienate or encumber," though shorter and less artistic, are clearly intended to terminate the annuity, if the annuitant "voluntarily alienates or encumbers" or "involuntarily suffers alienation or encumbrance by operation of law."

Unless this is so, the words "involuntarily alienate or encumber" are meaningless and would not even include a bankruptcy in invitum. Historically speaking such a bankruptcy no doubt arises from the past acts or defaults of the debtor or his predecessors. But there is no act of alienation, voluntary or involuntary, by the debtor. Bankruptcy can therefore only be included by the passive construction, and that construction once adopted cannot be confined to bankruptcy, but must apply generally.

Sheldon for the Administrator of Austrian Property. The accumulations admittedly come to me. As to the current annuity, the question depends on the construction of a very peculiar clause. There is no gift over as in *In re Schiff*. (4) The words "voluntarily alienate or encumber" would not cover bankruptcy except perhaps on a debtor's own petition. Perceiving this the testator probably inserted the words "or involuntarily" to cover the hiatus and provide for a

(1) (1861) 1 J. & H. 530, 540*n*. (1830) 1 Russ. & My. 690.
(2) (1829) 2 Sim. 479, 484; (3) [1921] 2 Ch. 251.
(4) [1921] 1 Ch. 149.

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bankruptcy in invitum, which the debtor could of course avoid by paying the debts. This class of bankruptcy may well have been in the testator's contemplation and would probably work a forfeiture. But the possibility and effect of the Peace Treaty Order cannot have been in his mind, and the annuitant is in no sense responsible for the charge thereby created. If his annuity is forfeited he is deprived of his right to compensation under art. 249 (*j*) of the Treaty.

ASTBURY J. [after stating the facts]. The residuary legatees contend that the forfeiture clause has operated and that both the arrears of the annuity accumulated up to the date of the Peace Treaty and the annuity itself have suffered forfeiture and passed into residue. The Administrator of Austrian Property, on the other hand, contends that the forfeiture clause has not operated either in respect of the accumulations or of the annuity itself, and that the same are payable to him.

The whole question turns on the meaning of the words: "Until he shall die or voluntarily or involuntarily alienate or encumber or attempt or affect to alienate or encumber the same or some part thereof."

The residuary legatees admit that in this Court the decision of Eve J. in *In re Levinstein* (1) covers the accumulations of the annuity up to the date of the Austrian Treaty. I follow that decision, and declare that those accumulations are payable to the Administrator of Austrian Property.

As to the annuity itself, the decision of Eve J. does not cover the point, as the clause before him was entirely different from the present clause. The residuary legatees contend that the expression "involuntarily alienate or encumber" negatives any act of volition on the part of the annuitant, and say that if the clause is construed as involving some act on the part of the annuitant, no real effect can be given to the word "involuntarily." I am therefore asked to say that the sentence really means "if the annuitant shall voluntarily alienate or encumber or involuntarily suffer alienation or encumbrance by operation of law."

(1) [1921] 2 Ch. 251.

There is a great deal to be said for this contention. The form of words used is not a common form at all, but in trying to put a construction upon them it must be borne in mind that the expression "involuntarily alienate" is by no means unknown in this country, and it has commonly been used with regard to the effect of bankruptcy.

The Administrator of Austrian Property contends that the word "voluntarily" covers all acts of volition on the part of the annuitant to alienate or encumber his interest. As this would not cover the effect of bankruptcy proceedings, except, possibly, in the case of a receiving order made on the annuitant's own petition, he contends that the testator may well have intended by the expression "involuntarily alienate or encumber" to cover bankruptcy which is brought about by the acts or defaults of the bankrupt, although this result, the alienation of his property, may well be involuntary on his part.

I think, on the whole, that the true construction of this clause involves, and was intended by the testator to involve, some act of the annuitant resulting in alienation or encumbrance voluntarily intended, or involuntarily resulting therefrom. At the date of the testator's testamentary dispositions the effect of bankruptcy was well known, but the possibility of a Peace Treaty and Order being made in the future with the present charging results could not possibly have been anticipated.

On the whole I have come to the conclusion that the charge in the order made under the Peace Treaty is not an involuntary alienation or encumbrance or an attempt to alienate or encumber the annuity within the meaning of the testator's will. The summons must therefore be answered to the effect that upon the true construction of the will, in the events which have happened, the annuity and its accumulations have passed to the Administrator of Austrian Property, and have not been forfeited.

Solicitors: *Dawes & Sons; Solicitor to Clearing Office.*

G. R. A.

C. A.
1921
July 16.

FREEMAN *v.* EVANS.

Landlord and Tenant—Tenancy from Year to Year—Notice to quit—Waiver of Notice—Creation of new Tenancy.

By an agreement dated May 28, 1888, the plaintiffs' predecessors in title let certain premises to the defendant Evans for the term of one year and so on from year to year, the tenant agreeing not to sub-let without the previous licence in writing of the landlords. On November 29, 1918, the defendant Evans, without the leave of the landlords, sub-let a portion of the premises to the defendants Fletcher & Co. By an indenture of lease dated December 31, 1919, the plaintiffs, being seised in fee simple of the whole of the premises comprised in the agreement of May 28, 1888, demised the same to the defendant Evans for the term of five years at an increased rent, the lessee covenanting not to sub-let without the leave of the lessors. On February 17, 1920, the defendant Evans proposed to raise the rent of the defendants Fletcher & Co., and on their failing to agree he gave them notice to terminate their tenancy. The defendants Fletcher & Co. then submitted to the increased rent, and the defendant Evans cancelled the notice to quit, the defendants Fletcher & Co. continuing as tenants at the increased rent. The plaintiffs then brought an action against the defendants Evans and Fletcher & Co. to recover possession of the whole of the premises, on the ground that as between the co-defendants, by the notice to quit and its subsequent withdrawal, a new tenancy had been created, which constituted a breach of the covenant in the lease of 1919 against underletting:—

Held, that the plaintiffs were entitled to judgment, the point being covered by *Tayleur* v. *Wildin* (1868) L. R. 3 Ex. 303, a decision which, though not followed by the Court of Appeal in Ireland in *Lord Inchiquin* v. *Lyons* (1887) 20 L. R. Ir. 474, had been uniformly accepted and acted upon in England.

Tayleur v. *Wildin* L. R. 3 Ex. 303 followed.

Decision of the Lancaster Palatine Court reversed.

Appeal from a decision of the Deputy-Chancellor of the County Palatine of Lancaster.

By an agreement dated May 28, 1888, the plaintiffs' predecessors in title let certain premises to the defendant Evans for the term of one year, and so on from year to year, the tenant agreeing not to sub-let without the previous licence in writing of the landlords. On November 29, 1918, the defendant Evans, without the leave of the landlords, sub-let a portion of the premises to the defendants Fletcher & Co.

By an indenture of lease dated December 31, 1919, the plaintiffs, being then seised in fee simple of the whole of the premises comprised in the agreement of May 28, 1888, demised the same to the defendant Evans for the term of five years at an increased rent, the lessee covenanting not to sub-let without the leave of the lessors. The lease also gave the lessor a power of entry upon breach of the said covenant.

On February 17, 1920, the defendant Evans wrote to Fletcher & Co. to the effect that as he had just taken a fresh lease of the premises at an increased rent he must in turn raise their rent by 50*l.* per annum.

In reply Fletcher & Co. wrote asking for further information as to how the proposed increase of 50*l.* was arrived at. The defendant Evans then wrote giving his reasons and insisting on the increase. Fletcher & Co. again asked for further information, whereupon the defendant Evans wrote "we beg to say we have in our opinion furnished you with all information necessary and if you do not feel disposed to pay the increase we have no alternative but to give you notice herewith." That letter was accompanied by the following notice, dated February 24, 1920: "We hereby give you three months' notice to quit and deliver up possession of the premises in 10 Back Colquitt Street, now occupied by you as sub-tenants, on June 1, 1920."

On February 25, 1920, Fletcher & Co. wrote: "In reply to your favour of Feb. 24th we regret that it is necessary for you to increase our rent by 50*l.* We hereby agree to pay the increase above mentioned to date as you suggest from Jan. 1, 1920."

On March 2, 1920, they wrote again asking for confirmation of their letter of February 25.

On the next day the defendant Evans wrote: "We beg to confirm your letter of Feb. 25th agreeing to pay the increase of rent by 50*l.* per ann. to date from Jan. 1st of this year."

On March 5, 1920, Fletcher & Co. wrote: "We thank you for your favour of March 3rd. I take it that this letter

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automatically cancels your notice dated Feb. 24th. We shall be glad if you will kindly confirm this in writing."

On March 8, 1920, the defendant Evans wrote to Fletcher & Co. as follows: "In reply to yours of the 5th inst. our letter of the 3rd cancels the notice we served upon you and therefore you remain as our tenants at the increased rent agreed upon."

On June 7, 1920, the plaintiffs commenced this action to recover possession of the premises comprised in the lease of December 31, 1919, on the ground that the defendant Evans had broken the covenant against sub-letting without the leave of the plaintiffs, who were therefore entitled to re-enter. The deputy of the Chancellor held that no new tenancy had been created between the defendant Evans and Fletcher & Co., and dismissed the action.

The plaintiffs appealed.

Hugh Gamon for the appellants. The appellants are entitled to enter by reason of the breach by the defendant Evans of his covenant not to sub-let without the leave of the plaintiffs. The first letting by Evans to Fletcher & Co. was a breach of the agreement of May 28, 1888, but that was not taken advantage of by the plaintiffs. After the lease of December 31, 1919, the defendant Evans again committed a breach of the covenant contained in that lease by creating a new tenancy as between himself and Fletcher & Co. By giving them notice to quit the then existing tenancy was determined, and by the waiver of the notice a new tenancy was created which, being a sub-letting without leave of the plaintiffs, constituted a breach of covenant and gave the plaintiffs a right to re-enter.

Where there is a notice to quit the tenancy is determined, and a subsequent waiver of the notice constitutes a new tenancy, and none the less so that the tenant continues at an increased rent: *Blyth* v. *Dennett* (1); *Tayleur* v. *Wildin.* (2) The latter case was dissented from by the Court of Appeal in Ireland in *Lord Inchiquin* v. *Lyons* (3), but it is submitted

(1) (1853) 13 C. B. 178. (2) L. R. 3 Ex. 303. (3) 20 L. R. Ir. 474.

that it is still good law: see Woodfall on Landlord and Tenant, 20th ed., p. 443, and Foà's Law of Landlord and Tenant, 5th ed., p. 606.

[WARRINGTON L.J. *Tayleur* v. *Wildin* (1) was not disapproved of in *Holme* v. *Brunskill*. (2)]

Courthope Wilson K.C. and *H. McMaster* for the respondent Evans. A mere agreement to pay an increased rent does not by itself amount to the creation of a new tenancy: *Geeckie* v. *Monk*. (3)

The giving of a notice to quit and a subsequent agreement for the cancellation of the notice does not create a new tenancy.

The notice to quit in this case was conditional and therefore invalid: Cole on Ejectment, p. 47.

In this case the notice was cancelled and treated as if it had never been given.

As to the effect of the covering letter see *Norfolk County Council* v. *Child*. (4) Reading the covering letter with the notice it is clear that the tenant had an option either to pay the increased rent or to go. The notice was therefore invalid.

Tayleur v. *Wildin* (1) is not now reliable. It was disapproved in *Lord Inchiquin* v. *Lyons*. (5)

Harold E. Gardner for the respondents Fletcher & Co.

[Various other points were taken and argued, but as the Court expressed no opinion upon them the arguments are not reported.]

LORD STERNDALE M.R. I think this appeal must be allowed on the first point.

With regard to the other points that were argued it is not necessary to express any definite opinion. [His Lordship stated the facts and continued:] It is said that the transactions which took place between the defendant Evans and the defendants Fletcher & Co. in 1920 resulted in the creation

(1) L. R. 3 Ex. 303.
(2) (1878) 3 Q. B. D. 495.
(3) (1844) 1 Car. & K. 307.
(4) [1918] 2 K. B. 805.
(5) 20 L. R. Ir. 474.

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of a new tenancy. The deputy for the Chancellor has found that no such new tenancy was created. That is the first point, and the main point upon which I do not agree with him. [His Lordship then referred to the correspondence and the notice to quit given by the defendant Evans to the defendants Fletcher & Co. and continued:] It is said that the notice of February 24, 1920, was not a good notice for this reason, that it must be read with the covering letter, and when so read it means this: We give you an option; you may either pay the increased rent or you may go, and the notice to quit simply means this: you may take one of two alternatives; it rests with you; you may either pay the increased rent or you may accept the notice and act upon it—one or the other you must do. It is quite clear—I need not go through the cases—that a notice to quit must be unconditional, and must not give to the tenant an option which he can accept without the permission of the person giving the notice to do something other than is required by the notice. The question is whether this notice, taken with the covering note, does give such an option. It is not clear, but I do not think it does. It depends upon the construction of the letter, and although I quite agree that we must not alter the language, I think that the word "if" must be taken as having the same meaning as the word "as," and that the fair construction was this: "I have asked you for an increased rent; you will not say that you will pay it; you go on asking for information, but I have given you enough, and if that is all you are going to do it is obvious from the correspondence I have no alternative but to give you notice." The notice itself which is sent is absolutely good, there is no condition whatever attached to it, and I agree with what has been suggested by the other members of the Court that if the covering letter is to have the construction contended for by the defendants we should rather have expected that it would have run in this way: "If you do not feel disposed to pay we shall have no alternative but to give you notice"; but it says: "We have no alternative"; and in that same letter the defendant Evans sends a perfectly

unconditional notice to quit. I do not think that that covering letter, taken in conjunction with the other correspondence, has the meaning the appellants attach to it, and I think the notice to quit is really valid. That being so, the question arises whether a new tenancy was then created. If it were there has been a breach of the covenant against sub-letting, contained in the lease of December 31 1919. The point is no doubt technical. I think if the parties had been asked whether there had been a new tenancy created from a business point of view they would have said what the Deputy-Chancellor has said: We have gone on at an increased rent. But for reasons I shall give I think in law a new tenancy was in fact created. I should perhaps have had some reluctance in enforcing or in making possible a forfeiture by a technicality of this kind if it were not that there was the clearest possible breach by the respondent of the previous agreement against sub-letting, and although I think that forfeiture for that breach cannot now be put in force by the appellants, it does a little mitigate the hardship that may be said to arise from treating the transaction technically and strictly as the creation of a new tenancy, if there be any question of hardship. But I have nothing to do with any question of hardship at all, if it is a new tenancy by law, which I think it is for this reason. I will read what was said—it is quite true it is a dictum—by Maule J. and by Jervis C.J. in *Blyth* v. *Dennett*. (1) The question was asked in argument: "Suppose here the landlord had distrained, would not that be evidence of a new or continuing tenancy?" and the learned Chief Justice says: "Not necessarily. A distress not acquiesced in, would not be evidence of a tenancy." Then he goes on to the matter which is important for this case: "The old tenancy was put an end to by the notice to quit. To make out a defence to the action, the defendant was bound to show a new contract. Payment and acceptance of rent accruing subsequently to the expiration of the notice, or a distress acquiesced in (which amounts to payment), would be evidence of such new contract. But, how can a demand and non-payment amount to any

(1) 13 C. B. 178, 180.

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evidence of a new contract?" Maule J., in the preceding passage, says: "There is this difference between a determination of a tenancy by a notice to quit, and a forfeiture; in the former case"—that is the notice to quit—"the tenancy is put an end to by the agreement of the parties—which determination of the tenancy cannot be waived without the assent of both; but, in the case of a forfeiture, the lease is voidable only at the election of the lessor: in the one case"—that is the case of the forfeiture—"the estate continues, though voidable; in the other, the tenancy is at an end." If the tenancy is at an end then if the tenant remains in after that and the landlord allows him to remain and receives rent, it must be by virtue of a new tenancy. That is what is said by those learned judges in that case. But the actual point came before the Court of Exchequer consisting of Kelly C.B., Martin and Bramwell BB. in *Tayleur* v. *Wildin*. (1) In that case the headnote is to this effect: "By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year, and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one." The dictum of Jervis C.J. in *Blyth* v. *Dennett* (2) was cited to the Court and the answer given by the counsel on the other side to that dictum was this: "The observation of Jervis C.J. (which was obiter) was made with reference to the facts of that case, where the tenancy had actually expired by the operation of the notice to quit, and efflux of time before the alleged waiver"—the alleged waiver being the withdrawal of the notice of the agreement which allowed the tenant to remain—"but in the present case the notice had been withdrawn before the expiration of the tenancy, so that the tenant's interest was a continuing one."

Now in this case the notice was withdrawn before the time limited for its expiration. We have seen that it was withdrawn very soon after it was given, by letters which followed to

(1) L. R. 3 Ex. 303, 304, 305. (2) 13 C. B. 178.

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this effect. [His Lordship referred to the correspondence and continued:] Therefore in this case the argument was distinctly before the Court that circumstances such as exist in the case before us now did not come within the dictum of Jervis C.J. and in circumstances such as exist here a new tenancy ought not to be held to have been created. Kelly C.B. said: "We are certainly here inter apices juris, but the objection taken must prevail." The question there was whether the person who had guaranteed the rent was still liable under his guarantee. He was objecting that he was not, because he had only guaranteed one tenancy, and another one was in existence when the rent became due. Then Kelly C.B. goes on: "The distinction between the present case and *Blyth* v. *Dennett* (1)"—I have already read what that distinction was—"is a distinction in fact, but not in principle. The question is, whether the tenancy under which this rent became due was the same tenancy as that in respect of which the guarantee was given, or was a new tenancy, and if the notice to quit was a notice that could be withdrawn and done away with at the option of the party giving it, and it was in fact so withdrawn whilst the tenancy subsisted, the tenancy would not have been determined. But it is clear that, whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. If that is so, then the consent of the parties makes a new agreement, and if there is a new agreement there is a new tenancy created to take effect at the expiration of the old tenancy. That is so here; and therefore this rent became due on a new tenancy, to which the guarantee does not apply; for it applies only to the tenancy which existed at the time when it was given." Martin B. only concurred. Then Bramwell B. said: "I am of the same opinion. A tenant from year to year has an interest in the land for so long as neither party gives a six-months' notice to quit. When that is done the estate is determined. This would be abundantly evident if we were to suppose the

(1) 13 C. B. 178.

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agreement to be reduced into writing, embodying the term that the tenancy should be determinable by a six-months' notice. If the notice is given, the tenancy is at an end; the parties may by a parol contract create a new tenancy, which is what is meant by the phrase withdrawing the notice, but the old tenancy no longer exists, and the guarantee, which only applied to the old tenancy, is gone." That, if it be good law, certainly determines this case, because it obliges us to draw the inference that in the circumstances of this case a new tenancy was created at the end of February, or at the beginning of March, 1920. It is said that it is not good law, but although, as I have pointed out, the decision is fifty years old, I think we ought to consider what Brett L.J. said in *Ahearn* v. *Bellman* (1): "My opinion is formed upon a ground which I have had occasion to state more than once, which is this, that where the law has been decided for years with regard to the management of property, as to its daily and constant management, or with regard to the conduct of mercantile or other business, we ought not—whether that decision is right or wrong—to alter it; because, in all probability, although it cannot be proved, there must have been many cases in which the law so laid down has been acted upon." Of course there must be limits to that doctrine, but at the same time it is to my mind a very salutary one to follow as far as possible. *Tayleur* v. *Wildin* (2) has never been affirmed by the Court of Appeal in England, also it is true it has never been criticised or doubted in any case in England and it certainly has been adopted in the text-books, by Woodfall, Foà, and Redman. It was mentioned and distinguished in *Holme* v. *Brunskill* (3), but it was distinguished without any suggestion of disapproval by any of the learned judges in the case. In *Ahearn* v. *Bellman* (4) Cotton L.J., although he was giving judgment on a different point, seems to me to have expressed himself very much to the same effect as the decision in *Tayleur* v. *Wildin* (2), but the point probably was not present to his mind and I do not wish to press that.

(1) (1879) 4 Ex. D. 201, 210.
(2) L. R. 3 Ex. 303.
(3) 3 Q. B. D. 495.
(4) 4 Ex. D. 201.

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I make these remarks because there is no doubt that *Tayleur* v. *Wildin* (1) has been very strongly criticised and indeed I think I may say entirely disapproved of by the Court of Appeal in Ireland in *Lord Inchiquin* v. *Lyons*. (2) Apparently opinion is not absolutely unanimous about it even in Ireland, and to a certain extent the judges seem to have been influenced in considering the question by land legislation in Ireland. But opinion has not been entirely so influenced, because a Court in Ireland presided over by Palles C.B., whose opinions are always worthy of the highest respect, has decided the other way, and I think at any rate a dictum of Sir Edward Sullivan in another case, which was referred to in *Lord Inchiquin* v. *Lyons* (2) also, is not quite in accordance with the decision of the Court of Appeal in that case, but that is not binding upon us. As *Tayleur* v. *Wildin* (1) has stood for so long without being disapproved of and has found its way into the text-books, and has no doubt, as Brett L.J. said, been acted upon for a great number of years and as it has been before the Court of Appeal in England and has never been in any way doubted or criticised by that Court, I think we ought to act upon it. That being so I am obliged to hold that here a new tenancy was created at the end of February and at the beginning of March, 1920, and that therefore there was a breach of the covenant not to sub-let without consent, and that the appellants had a right to re-enter. The Deputy-Chancellor does not seem to have considered the effect of these cases; he treated the question purely as one of fact, and on the facts said he did not think there was a new tenancy. I think these cases oblige us to hold that there was, and any regret I might have for creating a forfeiture by the strict technicality of a new tenancy is, I think, much alleviated by the fact that there was a former clear breach of agreement which the respondents were very lucky to escape from at that time.

I think therefore that the appeal must be allowed and that there should be judgment for the appellants with costs here and below.

(1) L. R. 3 Ex. 303. (2) 20 L. R. Ir. 474.

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WARRINGTON L.J. I am of the same opinion. I desire to add a few words on the question whether there had been a breach by the respondent Evans of the covenant against underletting contained in the lease of December 31, 1919. There clearly was a breach by him of the agreement against underletting, which was one of the terms of his previous tenancy agreement of May 28, 1888, but of that the appellants cannot now, after the surrender of that term, take advantage, and therefore I need not deal in detail with the arguments that have been addressed to us on that point.

At the time of the execution of this lease the respondents Fletcher & Co. were in possession of a part of the premises as tenants of the respondent Evans, that tenancy being determinable by a three-months' notice. On February 24, 1920, notice to quit expiring on June 1 was given by the respondent Evans to Fletcher & Co. I will assume for the moment that that was a good notice. After that notice had been given an agreement was come to under which Fletcher & Co. agreed to pay an increased rent and Evans agreed to cancel the notice to quit. The question is, on these facts, was there a new underlease from Evans to Fletcher & Co., or was there merely a continuation of the old tenancy at an increased rent? The case is plainly covered by *Tayleur* v. *Wildin* (1), where the question was directly raised. The defendant had guaranteed the rent under a tenancy corresponding for the present purpose with the original tenancy of Fletcher & Co. under Evans. Circumstances had arisen, almost precisely the same as those in the present case. The defendant said: "The present tenancy in respect of which the action is brought is not that which I guaranteed," and the Court came to the conclusion that that contention was right, and there was a new tenancy. Bramwell B. puts the point in the neatest and most precise terms that could be used. He said, if the notice to quit is given the tenancy is at an end. The Baron goes on: (2) "The parties may by a parol contract create a new

(1) L. R. 3 Ex. 303. (2) Ibid. 305.

tenancy, which is what is meant by the phrase withdrawing the notice, but the old tenancy no longer exists,"—that being the point before him—"and the guarantee, which only applied to the old tenancy, is gone." Could anything be more precise than that, that the old contract of tenancy ceased altogether by the making of the new agreement, on the withdrawal of the notice to quit under which the old tenancy came to an end? That case was decided fifty-three years ago. Even if I disagreed with it, which I am far from saying, I think it would be our duty to hesitate long before we overruled a decision which has become part of the text-books which have been cited. It was discussed in *Holme* v. *Brunskill* (1) and there distinguished, not as a case is sometimes distinguished, where the judge who distinguishes it does not approve of it, and wishes to get out of it, but it was distinguished on a real and substantial ground. It is quite true that it has never been expressly affirmed or approved of in the Court of Appeal, but, in the absence of any adverse criticism of it, the fact that there has been no express approval really does not go for very much. On the other hand it has been expressly and in the most positive terms disapproved of by the Court of Appeal in Ireland. Of course that decision is not binding upon us, and it must be borne in mind that that was a decision in accordance with the law in Ireland. It may well be, and in some respects at the present day it certainly is the fact, that the law of landlord and tenant in Ireland is not the same as the law of landlord and tenant in England, and the Irish judges may well look on such questions from a different point of view. This case however must be decided according to the law of England. I see no sufficient ground for differing from the view taken by the three judges in the Court of Exchequer (Kelly C.B., Martin and Bramwell BB.) in *Tayleur* v. *Wildin* (2), and I think we ought to follow that case, and if we do so then we must hold that a new tenancy was created by the withdrawal of the notice to quit, and accordingly there was an underletting since the date of the

(1) 3 Q. B. D. 495. (2) L. R. 3 Ex. 303.

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lease of 1919 which constituted a breach of the covenant contained in that lease.

There is little more to be said. It has been contended that the notice to quit was not a good notice because it was said to be conditional. I do not so regard it. The notice itself was a valid notice. Having regard to the correspondence I think the notice was a definite and valid notice to quit. The covering letter may be read in this way: "We take your demand for information as a refusal to pay the increased rent, and, that being so, we give you notice."

The appeal must be allowed and judgment entered for the appellants.

YOUNGER L.J. I am of the same opinion. The first underletting and, according to the respondents' view, the only underletting in this case took place on November 28, 1918, when the respondent Evans held the premises under a lease which precluded him from underletting the premises without consent. Counsel for the appellants complained that his clients have a substantial and serious grievance in respect of that underletting and he sought to support this appeal from the decision of the Deputy-Chancellor in respect of that substantial grievance by relying upon three or four technicalities which did not appear to my Lord or the Lord Justice or myself to be sufficient for his purpose. But the fact that these technicalities, although insufficient, were brought forward in order to obtain redress in respect of what he regarded as a substantial grievance may make one a little more inclined to look with favour upon one—and it is, in the extreme sense of the words, a technicality—if it will enable him to obtain redress and in that way substantial justice. I think that is the present position. The only remaining question being whether the transaction which took place between the respondents Evans and Frank Fletcher & Co. in February of 1919 amounted to a new tenancy created between themselves, or whether the old tenancy was thereby merely continued. Whether such a transaction amounts to a new tenancy or not is generally

of little or no importance to anybody, and that may account for the absence of authority upon the point. But in *Tayleur* v. *Wildin* (1) it was of real importance, because upon it depended the question whether the defendant was liable on a guarantee, and in the present case also it is important, because upon the view which is taken depends the question whether the plaintiffs are entitled to re-enter.

With regard to *Tayleur* v. *Wildin* (1) I agree with what my Lord and the Lord Justice have said. The principle on which that decision proceeded appears to me to be quite intelligible and having lasted as long as it has done it would not have been open to us to throw any doubt upon its correctness, even if we were more satisfied than any of us are, that it was wrong. In *Tayleur* v. *Wildin* (1) and in the present case it is a third person who is asserting that the transaction between the tenant and undertenant amounted to an underletting. In the case in Ireland the plaintiff who was asserting that the arrangement amounted to a new tenancy was himself the original lessor and not a third person. In addition to all the grounds which have been put forward by my Lord and the Lord Justice as showing that we ought to hesitate to follow that case in Ireland, when we can gain no assistance in the same direction from any English authority, I wish to draw attention to an observation of FitzGibbon L.J. in which, as it appears to me, he seems quite plainly to indicate that, where the question is raised by a third party like the present plaintiffs, and like Tayleur in *Tayleur* v. *Wildin* (1), the transaction may properly be regarded as being the creation of a new tenancy, so it would not be when regarded as between the landlord and the tenant themselves. In *Lord Inchiquin* v. *Lyons* (2) FitzGibbon L.J. says this: "That result"—that is to say the result of continuing the tenancy—"is attainable only by mutual consent, and is perhaps rightly described as a new agreement; and if so, as between the parties and any one else, it may be quite right to hold the old tenancy as at an end; but"—now he proceeds to deal with the case before the

(1) L. R. 3 Ex. 303. (2) 20 L. R. Ir. 474, 484.

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Irish Court—"as between the landlord and the tenant themselves, it is an arrangement to continue to hold under the old tenancy, or, at all events, upon the terms that the new tenancy shall be, in all respects, identical with the old." It therefore appears in the view of the Lord Justice that the facts in the Irish case and the parties to the Irish case constituted in his view a material distinction between the principle laid down in *Tayleur* v. *Wildin* (1) and the case then before the Irish Court. So that, from that point of view, the Irish decision can stand along with any case like *Tayleur* v. *Wildin* (1) where the person seeking to assert that a new tenancy has been created is not the landlord and is not the tenant.

With regard to the question of notice I have nothing to add.

Appeal allowed.

Solicitors: *Van Sandau & Co., for Wright, Becket & Pennington, Liverpool; Ridsdale & Son, for Cornish & Forfar, Liverpool; Routh, Stacey & Castle, for Gill, Archer, Maples & Dun, Liverpool.*

(1) L. R. 3 Ex. 303.

G. A. S.

WYLIE *v.* CARLYON.

EVE J.
1921
Oct. 18, 19.

[1920. W. 1973.]

Club—Debentures—Construction—No Charge on Assets—Acknowledgment of Indebtedness—Repayment as Committee may determine—Subrogation—Indemnity.

The rules of a club empowered the committee of management to issue debentures to members only, but gave no express power to create a charge upon its assets and property. Under this power the committee issued debentures at several times. Each debenture was for 100*l.* and contained an acknowledgment by the club of the money received from the member, and an agreement to repay the same with interest, subject to an annexed condition that the debenture would be paid off "as the Committee of the club may determine" on giving three months' notice. The debentures were issued to provide funds for purchasing the site of the club and the erection of permanent buildings, and the money thereby raised was applied for these purposes and also, in part, to pay off a previous mortgage on the club premises. In an action against the committee and members of the club by the executors of a deceased member who held 10,000*l.* of these debentures, claiming a declaration that they were thereby entitled to a first charge upon the assets, and were subrogated to the rights of the committee:—

Held, that no charge upon the property of the club was created or could be implied by the debentures, and the obligation to repay did not arise until the committee determined that the sum was repayable.

Held, also, that even assuming that moneys raised upon the debentures had been applied by the committee in discharge pro tanto of a prior mortgage debt, the debenture holders were not, by subrogation or otherwise, placed in the position of mortgagees to the extent of the sums so applied.

Held, further, that the debenture holders were not entitled by subrogation to any right of indemnity to which the committee were entitled out of the assets, inasmuch as the committee were not liable, and had made no payments against which they required to be indemnified.

ACTION WITH WITNESSES.

The plaintiffs, Angus Wylie and Howard Lacey Hewitt, were two of the executors of the will of Francis Brady deceased, who had been a member of the Junior Carlton Club, and they sued on behalf of themselves and all other holders of debentures issued by the committee of management of the club which was situate in Pall Mall in the county of London. The defendants were Alexander Keith Carlyon and Frederick William Fane, who were sued on behalf of

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themselves and all other members of the committee of management of the club; Francis Robert Anderton, sued on behalf of himself and all other members of the club; and Francis Reginald Pike, who was the third executor of the will of Francis Brady, and a former secretary of the club who declined to join as plaintiff in the action.

The Junior Carlton Club was formed in 1864 and it was proposed that premises should be acquired in Pall Mall. The club was managed by a committee of management, acting under certain rules.

Under r. 60 the trustees, in whom the site of the club house was vested, were given power to borrow on the security of the site and club house a sum not exceeding 50,000*l.*, and to execute a mortgage of the said site and house for securing the repayment of the principal moneys and interest advanced, and every covenant or agreement entered into by the trustees was to be binding upon the club and every member thereof, so that members were not personally made responsible for the payment of the mortgage moneys and interest.

In 1866 in pursuance of the power conferred by this rule a sum of 50,000*l.* was borrowed from Mr. Andrew Montagu upon mortgage of the freehold site and new buildings in Pall Mall, the interest being 4 per cent.

In 1880 the committee of the club were empowered at a general meeting to purchase Adair House for a sum of 57,000*l.* By r. 60A the then trustees of the club (among whom were the Marquess of Salisbury and the Earl of Beaconsfield), were authorized to purchase the freehold of Adair House for the purpose of a further extension of the club house.

Rule 63 provided as follows: "The Committee shall have power to issue from time to time debentures to such an amount as shall be necessary for the purchase of the freehold site and for the erection of the permanent buildings, such debentures to be held only by members of the Club, and to bear interest at a rate not exceeding 5*l.* per cent. per annum."

Rule 63A: "The Committee shall have power to issue from time to time debentures to such an amount as shall be

necessary for the purchase of Adair House and the erection and furnishing of the addition to the Club House intended to be built on the site thereof, such debentures to be held only by members of the Club and to bear interest at a rate not exceeding 5*l.* per cent. per annum."

Successive issues of debentures were made under these rules, and at varying rates of interest.

In 1889 for the consideration of 3000*l.* paid by F. Brady to the committee of management for the benefit of the said club, the then committee of management, acting under the powers conferred by the rules and for the purpose of raising money in accordance therewith, issued to F. Brady thirty debentures of 100*l.* each for securing the 3000*l.* and interest at 4*l.* per cent.

These debentures were to be held by members only, and on the face of them were signed by two members of the committee, who certified that they were duly authorized to be issued by the committee at a meeting on the date there stated, and were also signed by the secretary on behalf of the club and by order of the committee.

The material parts of these debentures for 100*l.* each taken by F. Brady were as follows: "The Junior Carlton Club acknowledge to have this day received from Francis Brady, Esq., of 12, St. Edmunds Terrace, Regent's Park, W., a member of the said club, the sum of one hundred pounds, and agree to pay to the said Francis Brady, Esq., his executors, or administrators, subject to the conditions hereunto annexed, the said sum of one hundred pounds with interest for the same after the rate of four pounds per cent. per annum. Conditions: The holder of this debenture is entitled to interest on the said one hundred pounds at the rate of four pounds per cent. per annum from the 15th day of January, 1882, to the 15th day of January, 1883, and thenceforward at the same rate yearly, payable on the 15th day of January in each year with a proportionate part up to the time of repayment. The debentures will be paid off as the Committee of the club may determine; but the committee will give 3 calendar months' previous notice of their intention to repay. . . . .

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In case of the death of the holder of this debenture it will be entitled to priority of repayment over debentures held both by continuing members of the club, and by persons who have ceased to be members of the club in any other way than by death. Except as aforesaid the priority of repayment will be determined by ballot."

On March 17, 1891, for the consideration of 2000*l.* paid by F. Brady to the committee of management a further 20 debentures in the same form were issued to him by the then committee to secure 2000*l.* with interest at 4*l.* per cent.

In 1897 for the consideration of 5000*l.* similarly paid by F. Brady further 50 debentures were issued to him to secure that sum and interest at 3*l.* 5*s.* per cent.

In 1913 the rate of interest was reduced to $3\frac{3}{4}$ per cent. on all the debentures and had since been paid at that rate. By his will, dated September 3, 1917, F. Brady, after specific bequests, devised and bequeathed his residuary estate and effects to the use of his trustees upon the trusts therein mentioned, and appointed the two plaintiffs and the defendant Francis R. Pike executors and trustees of his will. F. Brady died on February 1, 1919, and his will was duly proved by the three executors. The committee of management of the club refused to redeem the debentures held by F. Brady when requested so to do by the plaintiffs.

The 10,000*l.* advanced by F. Brady was applied by the club towards the purchase of the club premises and towards the erection or completion of the buildings and fitting up of the same, or, as the plaintiffs alleged, in repaying moneys theretofore borrowed for the benefit of the club. The action was brought on June 23, 1920, and in their statement of claim the plaintiffs alleged that the debentures were issued by the committee under the power to charge the premises and assets contained in the rules, or that such debentures involved or implied a charge upon the premises and assets of the club, or, alternatively, that the principal moneys and interest were a debt due from the club and enforceable against its property and assets, or alternatively, to the extent to which the moneys raised on the debentures were spent in

the acquisition, erection, or completion of the said premises and assets, the plaintiffs were entitled to be subrogated to the rights of the committee. In the further alternative the plaintiffs alleged that the principal moneys secured by the debentures were repayable as a debt on demand, or at the latest after reasonable notice, and that such notice was given originally on May 6, 1919, by a letter to the secretary of the club asking for redemption.

They accordingly claimed: (1.) A declaration that the plaintiffs and the defendant F. R. Pike (as entitled to the benefit of the debentures of the nominal amount of 10,000*l.*) and all other the holders entitled to the benefit of debentures issued by the committee of management were entitled to the benefit of a first charge upon the assets and property of the club (other than personal chattels within the meaning of the Bills of Sale Act, 1882), for securing the payment of the principal moneys and interest on the debentures mentioned. (2.) Alternatively, a declaration that the plaintiffs and all other debenture holders were entitled to a charge upon the assets and property of the club to the extent to which the moneys paid as consideration for the debentures had been applied towards the purchase of the site of the club buildings or the erection or completion of the buildings or the fitting up of the same, or in repaying borrowed moneys. (3.) To have the charge realized by foreclosure or sale of the assets, or a sufficient part thereof. (4.) An order for payment of the principal moneys and interest secured by the debentures. (5.) All necessary accounts and inquiries, ... and (7.) if necessary, a receiver or manager. By their defence the defendants denied that there was any power under the rules, as alleged, to charge the club premises by the issue of the debentures or that any charge was in fact given by them, or that the debentures involved or implied a charge. They alleged that the debentures were carefully drafted to avoid any expression or implication of a mortgage or charge of any kind, or to constitute a debt from the committee or members, but merely to be an advance by one member of the club to himself and the other members which was to be repaid if and when the

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finances of the club rendered it, in the discretion of the committee, expedient and not before. They denied that the committee who issued the debentures were entitled to be secured against liability in respect thereof out of the premises or assets of the club and that the plaintiffs were entitled to be subrogated to the rights of the then members of the committee, as they were never personally liable and did not sign the debentures as contracting parties, and there could be no question of subrogation. They further denied that the principal moneys were repayable as a debt on demand, but they did not repudiate the moral liability of the club to repay the 10,000*l.* ultimately. Owing to the increase of rates, taxes, and costs of provisions and repairs the finances of the club did not, in the opinion of the committee, permit of such repayment.

Hewitt K.C. and *Whinney* for the plaintiffs. Each of the debentures held by the plaintiffs impliedly created a charge upon the assets, being issued in accordance with rr. 63 and 63A. It was not intended that they should create only a moral obligation. A debenture, prima facie, implies or suggests a charge: *Edmonds* v. *Blaina Furnaces Co.* (1); *In re Tewkesbury Gas Co.* (2) But assuming that there was no charge, the debenture holders who were in effect substituted as mortgagees for Mr. Montagu are entitled to have that mortgage, which was paid off in part out of their moneys, kept alive for their benefit according to *Butler* v. *Rice.* (3) The principle of subrogation also applies, as our money was applied in discharging liabilities incurred by the committee of management on behalf of the club. They are entitled to be indemnified out of the assets and the debenture holders are entitled by subrogation to the benefit of that indemnity: *In re Magdalena Steam Navigation Co.* (4); *Troup's Case* (5); *In re German Mining Co.* (6); *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (7); *In re British Power Traction*

(1) (1887) 36 Ch. D. 215.
(2) [1911] 2 Ch. 279.
(3) [1910] 2 Ch. 277.
(4) (1860) John. 690.
(5) (1860) 29 Beav. 353.
(6) (1853) 4 D. M. & G. 19.
(7) (1882) 22 Ch. D. 61.

and Lighting Co. (1); *Kelner* v. *Baxter* (2); *Minnitt* v. *Lord Talbot de Malahide* (3); *Hopkins* v. *Worcester and Birmingham Canal Proprietors.* (4) The plaintiffs are therefore entitled to the same indemnity which the committee of management have. A legal obligation having been created by the debentures, a security is thereby implied. As no date for repayment was fixed by the debenture it is repayable on demand, or after reasonable notice. Under the conditions of the debentures those of a deceased member are entitled to priority of repayment. The plaintiffs who have to realize and distribute their testator's estate are not acting unreasonably in making this claim.

Clayton K.C. and *Underhill* for the committee of management and the members of the club. There is no power in the committee to make a charge on the assets under rr. 63 or 63A. If there was, no charge has been in fact created by these debentures, nor can it be implied. There is power to issue, but nothing is said about a charge. The term "debenture" is difficult to define. It is discussed in Stroud's Judicial Dictionary, 2nd ed., p. 468, where various definitions are suggested by Chitty J., Lindley M.R., and other judges, but no completely comprehensive definition is to be found. Certainly there is no inference that it creates a charge or gives a security. *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (5); *Levy* v. *Abercorris Slate and Slab Co.* (6)

A debenture merely creates a debt or acknowledges it. The object of issuing the debentures to members was to get rid of the mortgage to Mr. Montagu altogether. This was done and the interest on the debentures was reduced. With regard to the alleged subrogation the difficulties are insuperable. Subrogation never gives rights to a security. A person cannot be subrogated to the rights of others who have no rights themselves. There was no liability here for

(1) [1906] 1 Ch. 497.
(2) (1866) L. R. 2 C. P. 174.
(3) (1876) 1 L. R. Ir. 143; (1881) 7 L. R. Ir. 407.
(4) (1868) L. R. 6 Eq. 437.
(5) (1881) 7 Q. B. D. 165, 168.
(6) (1887) 37 Ch. D. 260.

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payment by the members of the club, or the committee. On the part of the members, their liability is limited by the provisions of the rules of the club to the payment of subscriptions, and they are not liable for the debts of the club: *Flemyng* v. *Hector* (1); *In re St. James' Club* (2); *Wise* v. *Perpetual Trustee Co.* (3); *Ellis* v. *Kerr* (4); *Napier* v. *Williams.* (5) Trading associations stand on a different footing. Nor is there any liability of the committee of management who issued the debentures. The secretary signed the debentures by the order of the committee. There is no breach of warranty of authority, no false statement alleged. Subrogation is defined in Lord Halsbury's Laws of England, vol. xiii., p. 149, as follows: "Where one person has a claim against another, a third person is, in certain circumstances, allowed to have the benefit of the claim and the remedies enforcing it, although it has not been assigned to him, and he is then said to be subrogated to the rights of the first person." There is nothing here to which the plaintiffs can be subrogated under that definition. The committee of management have made no payments for which they seek to be indemnified. The plaintiffs have no right therefore to any securities: *In re Wrexham, Mold and Connah's Quay Ry. Co.* (6); *Bannatyne* v. *MacIver.* (7) In the last case the principle is stated by Romer L.J. at p. 109. The cases referred to for the plaintiffs do not support the claim to subrogation. The whole claim is misconceived. To accede to it would produce a disastrous result, and is contrary to the plain terms of the bargain.

L. W. Byrne, for the remaining defendant, took no part in the argument.

Hewitt K.C. in reply on the position of the committee referred to *Steele* v. *Gourley.* (8)

EVE J. [after stating the parties and the claims in the action continued:] I do not pause to consider whether the

(1) (1836) 2 M. & W. 172.
(2) (1852) 2 D. M. & G. 383, 387.
(3) [1903] A. C. 139, 149.
(4) [1910] 1 Ch. 529.
(5) [1911] 1 Ch. 361.
(6) [1899] 1 Ch. 440.
(7) [1906] 1 K. B. 103.
(8) (1887) 3 Times L. R. 772.

action is rightly constituted for the relief that is claimed, especially that part of it which is founded on the doctrine of subrogation, but assuming that I have a properly constituted suit the first question is whether the plaintiffs have established their right to a declaration that these debentures constitute a charge on the assets and property of the club. That depends mainly upon the construction of the debentures and this is to be ascertained by an examination of the documents themselves and the consideration of such surrounding circumstances and other contemporaneous materials as are relevant, having regard to the dates of the respective contracts. The acquisition of the premises in Pall Mall involved not only a very large purchase price for the site, but a still larger expenditure for the erection thereon of a suitable club house and for the furnishing and equipment of the same. From the first it was appreciated that the entrance fees and subscriptions to be paid by the members would not be sufficient to produce the funds necessary for these purposes and accordingly there was included in the rules of the club a power to the trustees to raise a sum not exceeding 50,000*l.* by mortgage of the site. The rule giving this power (r. 60) laid down in definite terms the nature of the security to be given to the mortgagee, and the limit of the liability to be imposed on the trustees and members. In due course a mortgage was created under that power in favour of Mr. Montagu. The rules also provided that another body, not the trustees, but the committee of management of the club, should have power to raise money by the issue from time to time of debentures to such an amount as should be necessary for the purchase of the freehold site, and for the erection of the permanent buildings, such debentures to be held only by members of the club and to bear interest at a rate not exceeding 5*l.* per annum. Does that rule (r. 63) empower the committee to include in the debentures a charge on the site and the permanent buildings to secure the sums raised on debentures ? It is somewhat remarkable if such was their intention that the framers of the rules should have omitted from r. 63 any directions or limitations with regard to the security to be

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created by the committee corresponding with those to be found in r. 60 concerning the mortgage by the trustees. If, in fact, it was contemplated that the committee should have power by the debentures to charge the property, one would have expected to find in the enabling rule some limitation and some express provisions with regard to the conditions upon which the debentures were to be issued, and the circumstances in which the security thereby created was to be enforceable.

Treating it as a matter of construction pure and simple I think the rule does not, and was not intended to, authorize the committee to issue what I may call mortgage debentures, that is to say debentures charging the property of the club by way of security in favour of the lenders. The debentures contemplated were, in my opinion, certificates or acknowledgments of indebtedness, not mortgage debentures. That, in my opinion, is the extent of the power conferred upon the committee, and having regard to the nature of this association and to the well known legal principles applicable to clubs, I am not prepared to say that any grounds exist for holding that the committee having a general power to issue debentures have an implied power to issue them with a charge on the club's property. I think if such a power was intended to be conferred it would have been expressly provided for by the rules.

If this construction of the rules is right it follows that the debenture holders cannot be treated as entitled to any charge ; but assuming that the rule is open to the construction for which the plaintiffs contend and that the use of the word "debentures" in r. 63 confers on the committee a power to issue debentures of any description including debentures constituting a charge on the property and assets of the club, the question then arises : Did they in fact exercise that power, or did they in issuing these debentures abstain from giving the mortgage or charge for which the plaintiffs contend ?

For the purpose of considering this question I do not think it is necessary to deal separately with the successive issues. The relevant elements were present on the occasion of each

issue and I think I can therefore deal with all the issues as if they had been made at one and the same time. It is pointed out that when the debentures were issued it was stated that they were to be in substitution for the Montagu mortgage and both sides rely upon that statement. The plaintiffs contend that it meant that the debenture holders were to be substituted as mortgagees of the property for the one mortgagee, Mr. Montagu, and that they were to be put in the same position as the mortgagee had been. The defendants on the other hand deny that anything of the sort was contemplated. The whole object they say of the issue, made at a time when the club had become well established and was prosperous, was to get rid of the mortgage and substitute for the secured liability to the mortgagee the unsecured indebtedness to those members who were willing to advance the moneys. In answer to this contention of the defendants it is urged on behalf of the plaintiffs that when the members were invited to subscribe for the debentures the attractiveness of "the security" was emphasized and that again on the occasion when they were asked to take interest at a reduced rate much the same expression was used. That is perfectly true; but even in the case of personal security there are degrees of attractiveness, and in borrowing money for an association of this nature it was certainly legitimate to point out that the club was possessed of a very valuable property, unencumbered by any mortgage debt and with a large and influential membership, all factors tending to the security of any advances made. I do not think the mere use of the word "security" necessarily imports that a security in the nature of property charged to secure the debt was contemplated. It meant rather that the borrower was a substantial institution not likely to fail in the payment either of principal or interest, and was therefore one from whom the lender ought to be well satisfied to require a moderate rate of interest only. I do not say that the statements as to the substitution of the debenture debt for the mortgage, or the references to the character of the security are not to be noted, but I do not think I can or ought to spell out of them the

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conclusion that the debenture moneys were intended to be secured by a charge, or that any person was thereby led to believe that they were in fact so secured. So that really it comes back to the point, what is the construction of the debenture itself? It is clear that it contains no express charge, and as I have already indicated I can see nothing in the description "debenture" or in the relevant facts contemporaneous with the issue from which I ought to imply a charge. It is an acknowledgment on behalf of the club of the receipt of the money, and although I agree that from such an acknowledgment there would in any event be implied a promise or agreement to repay the money, it is not necessary in this case to have recourse to any implied promise or to speculate as to the terms of such promise, because there is in the document itself an express promise or agreement to repay —namely, an agreement to repay the principal sum when and as the committee of the club may determine, and in the meantime to pay interest thereon at the agreed rate by half yearly instalments. It is argued that in effect that is an agreement to repay on demand. If that be so any lender of money on these debentures could have demanded repayment of his loan within twenty-four hours of his having made it—a startling result having regard to the nature of this association and the relationship of the lender to the borrower. But I do not think that is the true construction of the contract here. This is not a document containing a contract to repay with a super-added proviso or condition making repayment dependent on the will of the debtor, in which case the proviso might well be rejected as repugnant to the contract. There is nothing in this contract to make the obligation to repay dependent on the will or pleasure of the debtor; the date when the obligation will arise is to be determined by the committee of the club —who must be trusted as between the lending member and the receiving club to do that which is honourable and right— and to determine in the best interests of the club. Bearing in mind the peculiar nature of a club, that it is not a commercial undertaking nor a partnership formed for profit or gain but is an association to which peculiar and well settled rules have

always been applied, I cannot see any ground for not giving effect to the contract for repayment as it stands, and in my opinion the decision in *In re Tewkesbury Gas Co.* (1) has no application here. In my opinion no charge is created by the debenture, and the obligation to repay does not arise until the committee of the club determines that the same is repayable. That conclusion disposes of the first claim in the action.

The second claim is in the nature of an alternative one. It is said that if the debenture holders have no charge by virtue of the contract between them and the club they are nevertheless, by reason of the fact that their moneys were used to pay off the mortgagee, entitled under the doctrine of subrogation to be placed in his shoes at least to the extent to which their moneys were applied in the redemption of the mortgage and to that extent they claim to be entitled to a charge on the property comprised in the Montagu mortgage. That is the way in which the claim is put forward in the pleading, but in my opinion that does not disclose a state of things to which the doctrine of subrogation has any application at all. An individual who advances money to another for the purpose of enabling that other to pay specific debts does not in the absence of a special bargain thereby acquire the rights of the persons whose debts are discharged out of his moneys against the property of the debtor. No case has been cited to show that even in circumstances in which the doctrine of subrogation is properly applicable the subrogated lender has been held to be entitled to the benefit of the security held by the creditor to whose rights he is subrogated, and even assuming it to be established that the moneys raised upon some of these debentures were in fact applied in the discharge pro tanto of the mortgage debt I am quite unable to adopt the view that the debenture holders were by subrogation or otherwise placed in the position of mortgagees to the extent of the sums so applied. In my opinion the alternative claim to a charge as pleaded also fails. But at the hearing a further claim was put forward. It was of this nature. The

(1) [1911] 2 Ch. 279; [1912] 1 Ch. 1.

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committee purported by these debentures to pledge the credit of the club. The club's credit could not be pledged. In those circumstances the committee are themselves liable to the debenture holders. But the money raised was applied for the purposes of the club and therefore it is said the committee are entitled to be indemnified out of the assets, and the debenture holders as the persons who actually found the money are entitled by subrogation to the benefit of that indemnity. It is a little difficult to follow this reasoning, but I think there are two complete answers, the one that the committee were not liable and the other that they never made any payment or did any act against which they required to be indemnified. Before the debenture holders can claim to be subrogated to any indemnity to which the committee would be entitled it is incumbent upon them to establish facts giving rise to a right of indemnity on the part of the committee and this they have wholly failed to do. In all the circumstances there is only one course open to me and that is to dismiss the action with costs.

Solicitors : *Wansey, Stammers & Co.; Norton, Rose & Co.*

G. M.

In re HOPKINSON.

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Oct. 26, 27.

[1917. H. 1878.]

Will—Real Estate—Trust for Conversion after Death of Tenants for Life—Complete Failure of Trusts of Proceeds of Conversion—Intestacy—Conversion—Blended Fund.

By his will a testator devised his real and leasehold estates to the use of trustees upon trust to let the same until the time thereafter appointed for the sale thereof and to apply the rents and profits meanwhile upon the same trusts as those upon which the proceeds of sale of his personal estate were thereafter given. He then gave his personal estate to his trustees upon trust to sell such parts as did not consist of money or satisfactory securities for money and to invest the proceeds and to stand possessed of the income of his residuary personal estate and of the rents and profits of his real and leasehold estates upon trust to divide the same among eight tenants for life or the survivors of them or the survivor other than G. H. The testator then declared that from and after the death of the last survivor other than G. H. his real and personal estate should be sold and converted at such time or times as his trustees should think fit and that his trustees should hold the proceeds of sale upon trusts which failed by reason of the death of G. H. in 1876 before any of the other tenants for life. The testator's heir at law died in 1882 and the last of the tenants for life in 1917 :—

Held, that the objects for which the sale was directed had in the result completely failed and therefore that no conversion was effected and the testator's real estate devolved upon the heir at law as real estate and passed on the heir at law's death to his heir. It made no difference that for some time after the testator's death it remained uncertain whether conversion would be necessary for the purposes of the will.

In re Lord Grimthorpe [1908] 2 Ch. 675 applied.

A statement of the law to the contrary in Jarman on Wills, 6th ed., p. 776, disapproved.

ADJOURNED SUMMONS.

By his will dated November 17, 1870, Edwin Hopkinson, after making a specific devise, devised and bequeathed all other his freehold, copyhold and leasehold hereditaments unto and to the use of trustees upon trust to let the same until such time as was thereinafter appointed for the sale thereof, and he directed his trustees to receive the rents and profits arising therefrom and after payment thereout of expenses and outgoings to hold and apply the residue upon

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the same trusts and in the same manner in all respects as was thereinafter mentioned with respect to the moneys which should arise from his personal estate. The testator then bequeathed all his household goods and effects to his trustees upon trust to sell and convert the same into money and to stand possessed of such moneys upon the trusts thereinafter declared concerning the annual rents and proceeds of his said real and leasehold estates and as to all other his personal estate gave the same to his trustees upon trust to sell and convert into money such parts thereof as should not consist of money or satisfactory securities for money and to collect and get in the residue thereof and to pay thereout his debts funeral and testamentary expenses and legacies and to invest the residue of the said trust moneys as therein mentioned. And the testator declared that his trustees should stand possessed of the interest dividends and annual income to arise from such investments of his residuary personal estate and of the annual rents and profits arising from his real and leasehold estates upon trust, after payment of any costs charges and expenses incurred by his trustees, twice in every year to divide the same into eight equal parts and to pay one such part to each of them Judith Broadbent, Ruth Horsfall, Mary Baker, Thomas Vickerman, George Hopkinson, Charlotte Broadbent, Susannah Broadbent and Ellen Bedford, for his or her natural life; and the testator further directed that upon the decease of any one or more of the said eight persons his trustees should hold the share or shares of him or them so dying upon trust to divide the same in equal shares amongst all and every the survivors in augmentation of the share so given to him or her as aforesaid. The testator then declared that from and after the death of the last survivor of the said eight persons excepting George Hopkinson his trustees should at such time and times as they should think fit sell dispose of and convert into money his said real and leasehold estates and all other his personal estate which should not consist of money and that his trustees should hold the moneys to arise from such sale upon trust in case the said George Hopkinson should then be living to invest the same and to pay the interest dividends

and annual produce unto the said George Hopkinson for the term of his natural life and from and immediately after his decease or in case he should not be the last survivor of the said eight persons upon trust to divide the said money arising from the said sale and conversion into equal shares and proportions "between and amongst all and every the children who shall attain the age of 21 years of such one of" the eight named persons other than George Hopkinson "as shall have died last previous to the said George Hopkinson to and for their absolute use and benefit and if there shall be only one such child then the whole to be paid to him or her on attaining the age of 21 years . . . . it being my will and mind that no child of the said George Hopkinson shall in any event take any share or interest under this my will."

The testator died on January 28, 1871. George Hopkinson survived the testator and died on March 1, 1876, being the first of the eight tenants for life to die. The last of the eight tenants for life to die was Susannah Graham (in the testator's will called Susannah Broadbent) and she died on October 25, 1917.

In 1917 the present summons was taken out by the sole trustee for the time being of the testator's will asking amongst other things: (1.) Whether on the true construction of the will of the testator and in the events which had happened he died intestate as to his residuary real and personal estate as from the death of the last survivor of the eight tenants for life; (2.) If the testator died intestate as aforesaid whether the plaintiff could and ought to distribute and deal with the residuary real estate of the testator on the footing that at the testator's death Joseph Pilling Hopkinson was his heir at law; (3.) If necessary, that an inquiry might be directed as to who were the persons entitled as heir at law of the testator at his death and if any of them had died, who were now entitled to the real estate; and (4.) If the said Joseph Pilling Hopkinson might be taken or was found to be the testator's heir at law, whether the estate and interest of such heir to the real estate of the testator passed on the death of such heir on November 18, 1882, intestate as real estate

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to his heir or as personal estate to his legal personal representatives.

On May 6, 1918, an order was made directing (inter alia) an inquiry who upon the death of the testator became beneficially entitled to any real estate of his as to which he died intestate, and if more than one for what estates or interests, and whether any such persons were since dead and, if so, who by devise, descent or otherwise, had become entitled to the real estate to which such persons so became entitled.

On April 18, 1921, the Master made his certificate by which he found that Joseph Pilling Hopkinson, the first cousin ex paterna of the testator, became entitled to any real estate of which the testator died intestate, that Joseph Pilling Hopkinson had since died on November 12, 1882, and that the persons who by descent became entitled to such real estate as passed on the death of Joseph Pilling Hopkinson as his real estate were the defendants Herbert Seddon and Hannah Hopkins in equal moieties.

The summons having been restored Sargant J. decided in answer to the first question that the testator had in the events which had happened died intestate as to his residuary real and personal estate as from the death of the last survivor of the eight tenants for life. He then proceeded to deal with the fourth question the decision on which alone calls for report.

W. M. Hunt for the trustee.

Beebee for H. Hopkins and H. Seddon. The trust for sale did not operate to convert the testator's real estate into personalty in the hands of his heir at law, because the trusts of the proceeds of sale failed. The trustees were to sell for the purpose of dividing the residuary real and personal estate among a class which never came into existence. When the purpose of a trust for sale entirely fails, it does not effect a conversion: *Ackroyd* v. *Smithson* (1); *Chitty* v. *Parker* (2);

(1) (1780) 1 Wh. & T. L. C., 8th ed., p. 394.
(2) (1793) 2 Ves. Jun. 271.

Smith v. *Claxton* (1); *Attorney-General* v. *Lomas.* (2) Those are cases of immediate trusts for sale, but the same principle applies to a trust for conversion at some future time: *In re Lord Grimthorpe* (3); see also *Ripley* v. *Waterworth* (4) for an enunciation of the general principle applicable. In Jarman on Wills, 6th ed., pp. 775, 776, it is suggested that the test is whether at the death of the testator the trust for conversion has necessarily failed and *Carr* v. *Collins* (5) is cited in support of this. That however was a case where there was only a partial failure of the objects of the conversion. The suggestion in Jarman on Wills is commented on in Theobald on Wills, 7th ed., p. 259, and it is submitted with justice. Here the trust of the residue had already become impossible at the death of the testator's heir at law by reason of the prior death of George Hopkinson.

J. F. Carr for persons interested in the heir at law's personal estate. There was not here a complete failure of the trusts for which conversion was directed. One of the purposes was to create a blended fund and for that it remained effective. It is true that the trusts of the blended fund have failed, but as it could at all time operate to create that fund there was only a partial failure of the trusts: *Attorney-General* v. *Lomas.* (6) *In re Richerson* (7) therefore applies and there was conversion. Unless this be correct and if it be held that there was a complete failure of the trusts *In re Lord Grimthorpe* (3) would apparently apply.

Norman Daynes, Guest Mathews, R. H. Hodge and *H. B. Vaisey* for other parties interested.

SARGANT J. The question I have now to determine arises out of my previous decision. I have come to the conclusion that on the true construction of this will the ultimate gift of the property real and personal after the decease of the last survivor of the eight tenants for life utterly failed and that

(1) (1819) 4 Madd. 484, 491.
(2) (1873) L. R. 9 Ex. 29.
(3) [1908] 2 Ch. 675.
(4) (1802) 7 Ves. 425, 435.
(5) (1843) 7 Jur. 165.
(6) L. R. 9 Ex. 29, 33.
(7) [1892] 1 Ch. 379.

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an intestacy resulted as to the whole of that property. The consequence of course is, under the rule in *Ackroyd* v. *Smithson* (1), that so far as the property consisted of real estate the reversion in question became vested in the heir at law of the testator at the date of the testator's death.

The question I now have to consider is whether, as between the real and personal representatives of the heir at law this reversion vested in him in the character of real or personal estate. In the former case it would vest in his heir at law and in the latter in his legal personal representatives, and I have had the question argued before me by the persons who would be entitled on those alternative views. In my judgment the matter is reasonably plain, but I think that I ought to be a little careful in what I say, because there is a direct conflict of opinion on this very point between two text-books of the highest repute, Theobald on Wills and Jarman on Wills. [His Lordship then stated the facts and continued :] I have come to the conclusion that the ultimate gift is one that totally fails, and therefore, as I have already said, that the real and personal estate passes as on an intestacy.

That being so, what is the general principle which I have to apply ? It seems to me that it is set out in the celebrated case of *Ackroyd* v. *Smithson* (1) ; and although the judgment of the then Lord Chancellor, Lord Thurlow, is extremely short, I think that for practical purposes one may take the celebrated argument of Sir John Scott, afterwards Lord Eldon, as containing the true view of the law. I say that the more readily because Lord Eldon when he was Lord Chancellor summed up the general principle in a similar manner in *Ripley* v. *Waterworth.* (2) That was a case dealing with partnership property, but it seems to me to contain the real germ of the matter. He says this : " There is an obvious difference "—that is to say, there is an obvious difference in a partnership case where there are persons other than the deceased partner who had an equity or right in the property to be converted—"from all the cases which establish this general principle, that where a person dealing upon his own

(1) 1 Wh. & T. L. C., 8th ed., p. 394. (2) 7 Ves. 425, 435.

property only has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this Court regards him as not having directed the conversion." There have been a large number of cases since then dealing with the matter, and it has often been held, especially in *In re Richerson* (1), a case which raised the point extremely neatly, that where there is an existing trust for conversion and some person, other than the beneficiary with regard to whom the Court is determining the matter, who is entitled to have that trust for conversion enforced, the property must be considered as being in that state in which it ought to be placed having regard to the terms of the will. And if in the present case there had been an immediate trust for sale and conversion, and the trusts of the will had been otherwise the same, it may very well be that, as the heir at law, Joseph Pilling Hopkinson, would then have died while there was an existing trust for sale capable of being enforced at the instance of some beneficiary, the property would as between his real and personal representatives have been considered to be of the nature of personal estate and to devolve accordingly. In fact, as Mr. Carr put it, where there is only a partial failure, the rule given effect to in *In re Richerson* (1) applies, though when there is a total failure, the trust for conversion has to be taken as never having been inserted in the will at all.

Mr. Carr based his argument on this and contended that under this will there was in fact only a partial failure. But during the lifetime of any of the eight tenants for life it seems to me that, as George Hopkinson was not in fact the last tenant for life, there was no trust for conversion. The property was to stand in its original state and the tenants for life were to receive the rents and profits of the real estate. Then after the death of the last survivor there is undoubtedly a direction to sell and convert; but, when that trust became operative on the face of the will, it utterly failed. There was not at any

(1) [1892] 1 Ch. 379.

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time any one entitled to enforce the trusts, and therefore in my judgment there was a total failure of the trust for conversion as set out on the face of the will. It has been put to me by Mr. Beebee that his case is strengthened because George Hopkinson, on whose death the ultimate trust became absolutely enforceable, died in 1876 while Joseph Pilling Hopkinson did not die until 1882: so that at the time when the nature of Joseph Pilling Hopkinson's interest falls to be considered it was already clear that there was not and could never be any effective trust in remainder. But I do not think that really matters. I think that even if George had died after Joseph Pilling Hopkinson, there would still have been no conversion, as the trust for conversion never in fact became enforceable at any time after the death of the testator.

I think *Attorney-General* v. *Lomas* (1) and *Smith* v. *Claxton* (2) entirely bear that out; but it is unnecessary to deal with these cases in any detail because the whole matter seems to me to be completely covered by the decision of the Court of Appeal in *In re Lord Grimthorpe.* (3) That no doubt was a case under a deed, but I can see no difference in principle between the position in respect of a deed and the position in respect of a will which has become operative by the death of the testator. In that case, "By a marriage settlement of 1845 real estates were conveyed by a settlor to trustees, subject to the prior life interests of his parents therein, to the use of the settlor for life, and, after his death, to the use of trustees upon trust to sell and hold the proceeds for certain specified purposes for the benefit of the settlor's wife and children, with an ultimate trust for the settlor, his executors, administrators and assigns. The settlor died in 1905, without having had any issue, and all the purposes for which conversion had been directed had at this date failed. By his will the settlor had devised 'his interest' in these estates to his 'successor Lord G. in fee.'" Eve J. had held that there was a conversion of the real estate into personalty,

(1) L. R. 9 Ex. 29. (2) 4 Madd. 484.
(3) [1908] 2 Ch. 675.

and then that what had happened afterwards had effected a reconversion of the property into real estate again. The Court of Appeal held "that, as the trust for sale arose only after the death of the settlor, there was at that time in the events which had happened no enforceable trust, and the question of conversion or re-conversion did not arise." The reason of the ultimate decision seems to me to be completely summed up in the remarks, obiter, of Cozens-Hardy M.R., who said (1): "Speaking for myself, I am not satisfied that the conclusion arrived at by Eve J. on this first point is correct. In the events which have happened there is no enforceable trust for sale. The executors could not in former days have filed a bill against the heir-at-law to enforce a sale: *Davenport* v. *Coltman*. (2) If this is the correct view of the construction of this settlement, the question of reconversion by will does not arise." Then Farwell L.J. said: "There was in fact no conversion at the date of the deed or afterwards." I do not think it is necessary for me to go through the judgments, but it seems to me that that is a direct decision, that, though the dispositions of a will or settlement may be such that in the future a trust for sale may possibly arise, nevertheless if in the result the trust for sale never does arise, then there is no effective trust for conversion to make the interest of the heir at law in the meantime an interest in personal estate instead of an interest in real estate.

Before finishing I will deal with the two references to the matter in the text-books I have mentioned, because it is of importance that I should express my opinion as to which of the two views is correct. In Theobald on Wills, 7th ed., p. 259, this is stated with reference to a case of *Carr* v. *Collins* (3): "It is laid down in Jarman, 5th ed., vol. i., p. 597, that 'the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the

(1) [1908] 2 Ch. 677.
(2) (1842) 12 Sim. 588, 610.
(3) 7 Jur. 165.

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heir will take the property as personalty, although these purposes may have failed before a sale takes place.' " That, of course, is precisely the sort of case that I should be determining here, if George Hopkinson had died after the heir at law. In that case it would at the time when the heir at law died have been uncertain whether there would be an effective trust for conversion. Then the learned editor goes on : " The proposition may be right, but no such question arose in *Carr* v. *Collins* (1) where there was no intestacy." Then in the next edition, the 6th ed., of Jarman on Wills, p. 775, this passage occurs : " But if the purposes of the will wholly fail, as if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate." That is absolutely right ; there can be no question about that proposition; indeed I have been founding my judgment on it. But then comes this passage : " and in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed "—that again is quite sound—" but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place." In my judgment that is too broadly stated. In the present case it was at the time of the testator's death uncertain whether a sale would ultimately be required or not, because there might have been persons to take the proceeds of conversion under that curious ultimate trust. But inasmuch as that trust in the result wholly failed and there was in the meantime no trust for conversion, and no person who would necessarily be entitled to enforce conversion, no conversion was effected. The matter has to be determined by the result and not by that which might or might not happen. That

(1) 7 Jur. 165.

seems to me clear both on the authority of the general principle and on the authority of *In re Lord Grimthorpe* (1) in the Court of Appeal. There is in this case a total failure of the purposes for which conversion was directed, and it is quite immaterial that for some period after the date of the testator's death—or even, as might have happened, for some period after the date of the death of the heir at law—a conversion might have been necessary for the purposes of the will. The property must be treated as being unconverted, and I decide accordingly that the persons to take the testator's real estate are the persons entitled to the real estate of the heir at law.

Solicitors : *Jaques & Co., for Booth & Fisher, Huddersfield ; Helliwell, Harby & Evershed, for Jubb, Booth & Co., Halifax ; P. R. Christie, for Armitage, Sykes & Hinchcliffe, Huddersfield.*

H. C. G.

In re BOULTER.

CAPITAL AND COUNTIES BANK *v.* BOULTER.

[1921. B. 1198.]

Will—Construction—Gift of settled Fund to Infants—Condition subsequent—Proviso prohibiting Infant's Residence Abroad—Gift Over on Non-compliance—Validity of Condition—Public Policy—Possibility of Compliance.

A testator by his will made in 1916 having settled a share of his residuary estate upon a son, and the son's children, provided that the gift to the children was upon the express condition that they should during their respective minorities be maintained in England, and should not reside abroad except for periods not exceeding six weeks in each year. Upon non-compliance with such condition in the case of any such child, his or her share was to be forfeited, and accrue to the shares of the other children, with a gift over in the event of non-compliance in the case of all of them. At the date of the testator's death in 1917 the son had two infant children, whose mother was of German origin :—

Held, that the condition was a condition subsequent, that "abroad" meant anywhere outside the British Isles, that the non-compliance referred to meant the non-compliance of the parents, and that, so

(1) [1908] 2 Ch. 675.

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interpreted, the condition, though not too uncertain to be enforced, was void as being contrary to public policy, and tending to the possible separation of the parents from their children.

In re Borwick's Settlement [1916] 2 Ch. 304 distinguished.

ORIGINATING SUMMONS.

By his will, dated September 14, 1916, Stanley Carr Boulter, having appointed Reginald Stanley Lewis Boulter and Robert Abercromby Gordon to be executors thereof, and the Capital and Counties Bank, Ld. (hereinafter called "the trustees"), to be trustees thereof, by clauses 6 and 7 devised all his real and the residue of his personal estate unto the trustees upon trust for sale and conversion, and after payment thereout of funeral and testamentary expenses, debts, legacies and duties, to divide the same into six equal parts, and to hold one of such equal sixth parts upon trust for his son Reginald Stanley Lewis Boulter for his absolute benefit, and to hold the remaining five equal sixth parts upon trust to invest each of them as a separate and distinct fund in some or one of the modes of investment thereinafter authorized. By clause 9 of his will the testator directed that one of such five equal sixth parts and the fund representing the same should be appropriated for the benefit of his son Stanley John Boulter, and made a similar declaration as to the other four parts in favour of his daughters therein named. And by clause 10 the testator directed that the trustees should hold the settled fund of his son Stanley John Boulter upon trust to pay the income to him during his life. And from and after his decease and whether he should survive him or die in his lifetime, upon trust as to both corpus and income for the children of the said Stanley John Boulter or any of such children or any of their issue in such shares (if more than one) and in such manner as he should by any deed or deeds or by his will or any codicil appoint. And in default of such appointment, and so far as such appointment should not extend in trust for the children of his same son who being male should attain the age of twenty-one years, or being female should attain that age or marry in equal shares, and if there should be only one such child, the whole

to be in trust for that one child. But so nevertheless that no child who or any of whose issue should take a share under any such appointment as aforesaid should take any share of the settled fund remaining unappointed without bringing the appointed share into hotchpot and accounting for the same accordingly, unless his son should by such appointment direct the contrary. The will next contained the following proviso: "Provided also that the gifts hereinbefore in clause 5 and this present clause declared in favour of the children or child of my said son Stanley John Boulter are given upon the express condition that such children or child are or is at all times during their or his respective minorities (both before and after my decease) maintained in England and do not reside abroad except for periods not exceeding six weeks in each year. And upon non-compliance with the foregoing condition in the case of any such child, his or her shares shall be forfeited and form an accretion in equal proportions to the shares or share of the remaining children or child of my said son. And in the event of non-compliance with the foregoing condition in case of all the children of my said son or if there shall be no issue of my said son who being male shall attain the age of twenty-one years, or being female shall attain that age or marry I direct that my trustees shall hold the settled fund of my said son and the share of my grand-children's fund (if any) to which his said children may be entitled under clause 5 hereof upon trust for my said children, Reginald Stanley Lewis Boulter, Gertrude Edith Alice Kathleen Boulter, Ethel Gladys May Bendall, Edith Mary Ada Peard and Elsie Grace Boulter or the survivors or survivor of them for their absolute benefit in equal shares and so that the share or shares accruing to each of my said children shall be subject to the trusts thereby declared concerning the share or settled fund of the same child." Under clause 5 of the will the children of Stanley John Boulter had a contingent interest in a specific bequest of property described by the testator as "the grandchildren's fund," but such interest was stated to be "subject to the conditions as to their maintenance education and residence in England

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contained in clause 10 of this my will." By clause 11 the remaining four shares of residuary estate and the invested funds representing the same were settled upon the testator's four daughters and their children and issue.

The testator died on January 5, 1917, and his will was proved by the executors on February 21, 1917.

The testator's son Stanley John Boulter married on May 28, 1910, in London Elsie Eugenie Nieustædt [*sic*] who was at that time of German nationality. There were two children of the marriage, the defendants Hugh Herman Boulter and John Clifford Boulter, aged ten and nine years respectively.

Stanley John Boulter was a member of the Stock Exchange, but in 1916, when the testator made his will, he was on active service with the British Army. At the conclusion of the war he returned to the Stock Exchange, but there was evidence that on account of depression in business his employment there was likely to be terminated, and that being a good linguist, he intended to endeavour to obtain a business post abroad, in which event he wished to take his family with him.

The plaintiffs, as trustees, issued this summons to determine (inter alia) the following questions: (1.) Whether the condition contained in clause 10 of the will prohibiting the residence of the infants abroad was now in operation, or whether it would only come into operation on the death of their father Stanley John Boulter; (2.) whether, if now operative it was void for uncertainty or as being contrary to public policy; (3.) whether if not so void the residence of the infants abroad for more than six weeks while in the custody of their father and without the exercise of any volition on their part would amount to non-compliance with the condition . . . .; (5.) whether the word "abroad" included parts of the United Kingdom outside England.

The defendants were the two infant children, Hugh Herman Boulter and John Clifford Boulter, and Reginald Stanley Lewis Boulter, Ethel Gladys May Bendall and Elsie Grace Boulter, a son and two daughters of the testator entitled under the gift over upon non-compliance with the condition.

Jolly for the plaintiffs.

J. W. F. Beaumont for the infant defendants. The condition is a condition subsequent, and is void on any one of three grounds, either as being (1.) too uncertain; (2.) contrary to public policy; (3.) impossible of compliance by the infants.

The expression "abroad" is too vague; it is not clear to what it extends, or whether it includes or excludes Scotland or Ireland or the Channel Islands: *Clavering* v. *Ellison.* (1)

On the question of public policy, it is a recognized duty on the part of a father to bring up his children with him. But in the present case the father may have to go abroad for business reasons, in which case he could not take the children with him, if this clause is good, without causing a forfeiture of their interests. A condition is bad if it hinders a man from doing his duty. Again such a condition would tend to embarrass the Court in dealing with its wards, and the children may be made wards at any time: *In re Sandbrook.* (2)

Thirdly, the condition is imposed on two children aged nine and ten, and they cannot possibly comply with it of their own volition. A condition imposed upon a person who cannot freely perform it is bad: *Wilkinson* v. *Wilkinson* (3); *Mitchel* v. *Reynolds* (4); *Partridge* v. *Partridge.* (5)

Hart for the defendants entitled under the gift over. The condition is valid. It must be construed in the light of the surrounding circumstances as known to the testator. He was most anxious to prevent the children from being taken to Germany by their mother to be educated, or to any other part of the world where German influence might prevail, a contingency which he thought might occur if his son was killed. He desired them to be brought up within the jurisdiction of English law, and such an intention is in accordance with public policy. The prohibition is addressed to the parents,

(1) (1857) 8 D. M. & G. 662 (C. A.); (1859) 7 H. L. C. 707.
(2) [1912] 2 Ch. 471.
(3) (1871) L. R. 12 Eq. 604.
(4) (1711) 1 P. Wms. 181.
(5) [1894] 1 Ch. 351.

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and as such is good, and the non-compliance referred to must be that of the parents: *In re Borwick's Settlement.* (1)

[SARGANT J. That was a case not of a condition subsequent, but of an original limitation.]

The argument for the infant was there put on the ground of public policy, and on the true construction of the will this is a conditional limitation.

As to impossibility, all the cases referred to were cases where a person was called upon to do something, and the condition operated if he refused or neglected so to do; an infant cannot refuse or neglect.

A condition precedent cannot be avoided on the ground of public policy. The property is given to the children so long as they reside in England, and if they do not, then over: *Partridge* v. *Partridge.* (2)

SARGANT J. In this case I have to determine whether a condition with regard to the residence, education and maintenance of certain children is void or not. The first question on the summons is whether the condition in question has come into operation now or whether it will only come into operation on the death of the children's father. As to that I do not think there is any doubt. The will is the will of a Mr. Stanley Carr Boulter. He had several sons and several daughters, and he first of all provides for the children of one of his sons, Cyril Stanley Carr Boulter, a fund of some 8000*l.* stock, and by clauses 4 and 5 he provides that a fund which he describes as his "grandchildren's fund" shall be applicable for the benefit of his son Cyril's children and then in case of failure of those children that the fund is to be held "upon trust for the children of my daughter Ethel Gladys May Bendall and of my son Stanley John Boulter for their absolute benefit," but subject in the case of the infant defendants "to the conditions as to their maintenance, education, and residence in England contained in clause 10 of this my will." That is a contingent interest which may fall into the trust fund which I have already dealt with, and

(1) [1916] 2 Ch. 304. (2) [1894] 1 Ch. 351.

it is suggested that the language of that gift may have some influence on the language of the gift with which I have to deal. In my judgment however there is nothing in that which casts any light upon the trust subsequently contained in the will of the main fund with which I have to deal. By clause 10 of the testator's will, which is the material clause for this purpose, he directed that his trustees were to hold the settled fund of his son Stanley John Boulter—which as a matter of fact was a share of the residue of his estate—"upon trust to pay the income thereof to him during his life and from and after his decease, and whether he shall survive me or die in my lifetime upon trust as to both corpus and income for the children of my said son Stanley John Boulter or any of such children, or any of their issue (if more than one) and in such manner as he shall by any deed or deeds or by his will or any codicil thereto appoint, and in default of such appointment and so far as any such appointment shall not extend in trust for the children of my same son who being male shall attain the age of 21 years, or being female shall attain that age or marry"; and then there is a hotchpot clause. Then comes the proviso upon which the present question turns: "Provided also that the gifts hereinbefore in clause 5"—that refers to the grandchildren's fund—"and this present clause declared in favour of the children or child of my said son Stanley John Boulter are given upon the express condition that such children or child are or is at all times during their or his respective minorities (both before and after my decease) maintained in England and do not reside abroad, except for periods not exceeding six weeks in each year. And upon non-compliance with the foregoing condition in the case of any such child his or her shares shall be forfeited and form an accretion in equal proportions to the shares or share of the remaining children or child of my said son." Then there are other gifts to which I do not think it necessary to refer.

That being so, the present position of affairs is this. The son, Stanley John Boulter, was married in the year 1910 to a German lady and at the time the will was made he

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was away in the war fighting and no doubt the condition of the will had some reference to those facts. Since the conclusion of the war he has returned to England; he has been engaged on the Stock Exchange, but owing to the bad times and the lack of business on the Stock Exchange he finds that his employment is failing him. He has a certain gift or knowledge of foreign languages and he thinks that the best form of employment that he can engage in is to go abroad and make use of that special knowledge. He now desires to know whether if he goes abroad and takes his wife and children with him, which he would naturally desire to do, the result would be that his children will forfeit the interest given to them under clause 10.

The first question to determine is whether the condition in question is a condition precedent or a condition subsequent. As to that I have no doubt whatever. There is a clear gift to the children which vests the property in them on their attaining twenty-one or, in the case of daughters, marrying. There is superadded to that gift a gift which is described by the testator himself as being a gift over on forfeiture. In my judgment the condition in question is a clear condition subsequent. That being so it is said that I ought not to favour the condition subsequent if the gift is liable to fail on any one of several grounds. Three grounds have been suggested as grounds upon which this gift may fail. The first is uncertainty, the second is that it is contrary to public policy, and the third is that there is an impossibility in the children electing whether to comply or not to comply with the condition.

With regard to uncertainty I feel considerable difficulty. The gift is certainly not as uncertain as in the great case of *Clavering* v. *Ellison*. (1) There there was a difficulty in determining what was meant. But at the same time I think this will is not by any means a clear one. When the testator talks of the children being maintained in England, with regard to that I think there is no reasonable doubt. Then he says "and do not reside abroad except for a period not

(1) 8 D. M. & G. 662 (C. A.); 7 H. L. C. 707.

exceeding six weeks in each year." What does that mean? Is "abroad" contrasted with England or has the word "abroad" the ordinary meaning in the English language? Mr. Hart says that "abroad" means anywhere out of England. So that if the children went for eight or ten weeks to Scotland there would be a forfeiture. I do not think that contention can be sound. The word "abroad" is not satisfied by a transference to some other part of these islands, although it may be that the children are taken out of the English jurisdiction. The word "abroad" can never be used by anybody in talking of a person who has gone to Scotland nor, I think, of a person who has gone to Ireland rebus sic stantibus. There is therefore some little difficulty in deciding whether "abroad" means out of England, or means as it ordinarily means, outside the British Islands. I think myself it must mean outside the British Islands. But there is a certain degree of uncertainty, and clearly it is uncertain enough to make me uncertain whether it is certain or not, and if I had no other ground upon which to decide the case I think I should have reserved judgment and taken a good deal of time and trouble in thinking that matter out.

But there is a second point, the question of public policy: is it contrary to public policy that children to whom interests are given should be deprived of those interests in case they follow the fortunes of their parents should the parents go abroad? In my judgment such a condition is clearly contrary to public policy. It seems to me very liable to encourage a father to neglect his duties towards his children in such a case as has arisen here, and a circumstance that I do not overlook is the possibility of the children coming by their next friend to the Court and putting the case to the Court whether they should go abroad with their father and lose the property or remain in England retaining the property and losing the advantages of being with their parents. It seems to me that the whole tendency of this provision is one which in many sets of circumstances, including the circumstances now disclosed, might have a very prejudicial effect indeed on the position of the infants and upon the

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judgment that has to be exercised by their parents for their benefit.

The third objection that is taken is that the clause cannot be valid, because it seeks to take away something from the infants on an exercise by the infants of a judgment or determination which they are incapable of exercising. In support of that contention several cases have been referred to including *Partridge* v. *Partridge*. (1) On this point I agree there is difficulty. If the "non-compliance with the foregoing condition" is meant to be a non-compliance on the part of the father or parent, it appears to me that the argument for the clause being void as contrary to public policy is considerably strengthened. But in any case, even if that be so, even if the non-compliance originally had to be the non-compliance of the father or the parent, I am quite sure it is clear that non-compliance on the part of the children after the death of the father and mother is not aimed at or referred to. Here again this is not anything like so strong a ground as the second ground that I have mentioned, and I prefer with regard to that to withhold my judgment. I think I ought to say this. Counsel for the other children said a great deal about the mother being a German mother and it being undesirable for anybody to leave England and become subject to German culture. But I am not aware that there is any question of that kind which can be usefully considered here. The clause is not limited in any way to Germany, it is a prohibition as to the whole world against the British Islands, and I do not think that in determining the matter I ought to have any regard to the fact that some part of the world outside the British Islands is subject to German culture. I think I ought to say also that very great stress was laid by counsel on a decision of Eve J. in *In re Borwick's Settlement*. (2) I intimated to him when he cited the case and after he had gone through it at some length that it did not seem to me to apply, because the question there was not a question of a condition subsequent at all, and after having looked at the case again I am confirmed in the opinion. It seems to

(1) [1894] 1 Ch. 351. (2) [1916] 2 Ch. 304.

me that the learned judge there had to deal with the case of something entirely different from a condition subsequent—namely, the case of a defined period during which a certain power might be exercised. That is all. The considerations applicable to a question of that kind seem to me to be totally different from the considerations applicable to such a case as the present where there is a clear original vested gift in certain defined persons, and there is then a clear condition subsequent taking the benefits away from them on specified conditions.

I declare that although the conditions are operative during the life of the parent they are void.

Jolly asked that the plaintiffs should be entitled to their costs, charges and expenses as trustees of and incidental and preliminary to the summons, on the ground that the usual practice of the taxing Masters was to disallow the costs of opinions on cases given before the commencement of proceedings.

SARGANT J. I am asked to say that because the plaintiffs are trustees of a particular class—namely, a corporation—the Court ought to give them extra costs. I am surprised to hear that the taxing Masters disallow trustees costs of opinions in such cases, but I cannot make any different order in the case of a bank from that of any other trustee.

Solicitors: *Stanley, Hedderwick & Co.; Budd, Johnson, Jecks & Colclough.*

H. L. L.

Considered. WHITESIDE *v.* WHITESIDE. [1949] 1 All E.R. 755.

Distinguished. WHITESIDE *v.* WHITESIDE. [1949] 2 All E.R. 913.

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Distinguished. WHITESIDE *v.* WHITESIDE [1950] 1 Ch. 65

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[1921. B. 2559.]

Nov. 8, 17. *Revenue—Income Tax—Order for Maintenance free of—Deed to secure annual Sum free of Income Tax—Contravention of Prohibition of Income Tax Acts—Rectification—Jurisdiction.*

Where the Divorce Court ordered a husband to secure by deed to be settled by Conveyancing Counsel of the Court the payment to his wife of an annuity and that all payments under the order should be free of income tax, and subsequently by a deed drawn up in pursuance of the order the husband settled property upon trust that the trustees should pay that annuity to his wife free of all deductions whatsoever, including income tax, such a provision for the payment by the trustees of the annuity free of income tax contravenes the prohibitions of the Income Tax Acts and is void, but the wife is entitled to have the provision rectified so as to provide that the trust fund shall be held by the trustees as security for the payment to the wife of the annuity free of income tax.

By an order of the Divorce Court in 1907 the husband of the plaintiff was ordered to secure by deed to be settled by Conveyancing Counsel of the Court the payment to her of an annuity. And it was further ordered that all payments under the order should be free from income tax. By a deed made in 1909 in pursuance of such order certain property was settled by the husband upon trust that the trustees of the deed should pay out of the yearly income therefrom the annuity free of all deductions whatsoever, including income tax, to his wife. The wife now claimed a declaration that the trustees should continue to pay the annual sum to her free from income tax, and alternatively that the provision in the deed as to payment of the annual sum free from income tax should be rectified, so that she could receive the annual sum free of income tax without thereby contravening the prohibitions contained in the Income Tax Acts:—

Held, that the provision for payment of the annual sum free of income tax by the trustees to the wife contravened the prohibitions of the Income Tax Acts and was void, but that the wife was entitled to the rectification of that provision so as to provide that the trust fund should be held by the trustees as security for the payment of the annual sum free of income tax.

ACTION.

This action was brought claiming a declaration that upon the true construction of a deed dated July 20, 1909, the trustees thereof must pay an annuity thereby given without deducting therefrom income tax and alternatively rectification of the deed so that the annuity under the terms thereof

could be paid free of income tax without thereby contravening the prohibitions of the Income Tax Acts.

James Samuel Burroughes was married to the plaintiff Agnes Vivienne Vincent Burroughes on October 26, 1893. On September 11, 1907, a decree nisi pronounced by the Probate, Divorce and Admiralty Division for the dissolution of the marriage, was made absolute. On November 25, 1907, the Divorce Court made an order that James Samuel Burroughes should secure by deed, to be settled by one of the Conveyancing Counsel of the Court, the payment to the plaintiff during their joint lives of the annual sum of 1400*l.* and should secure the payment of the annual sum of 1000*l.* to the plaintiff for her life on his death, and it was further ordered that all payments under that order should be free of income tax.

By an indenture of settlement dated July 20, 1909, executed in pursuance of the order of November 25, 1907, and by way of compromise of certain disputes between the plaintiff and her husband as to the security which ought to be given certain trust premises were settled upon trust that the trustees of the deed should pay out of the income thereof to the plaintiff the annual sum of 1400*l.*, free of all deductions whatsoever including income tax during the joint lives of herself and her husband and after his death of the annual sum of 1000*l.* free of all deductions whatsoever including income tax during her life. Clause 16 provided that if the husband should transfer into the name of the trustees investments of a nature authorized by law for the investment of trust funds by trustees producing at the time of such transfer sufficient annual income to pay if such transfer should be made during the joint lives of the plaintiff and her husband the yearly sum of 1400*l.* free of income tax and if such transfer should be made after the death of the husband the yearly sum of 1000*l.* free of income tax thenceforth all the trust premises should be held in trust for the husband his executors and administrators absolutely and the trustees should stand possessed of the investments so transferred to them upon trust out of the annual income thereof to pay to the plaintiff the said

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respective sums of 1400*l.* and 1000*l.* free of income tax and that if the income of the investments so transferred should at any time and from any cause whatever prove insufficient for the payment of such yearly sums respectively in full resort might be had to the capital thereof from time to time to make good such deficiency. By clause 18 the plaintiff released her husband of certain covenants entered into by him in a deed of separation to pay her certain annual sums and covenanted to accept the provisions thereby made for securing to her the payment of the yearly sums of 1400*l.* and 1000*l.* in full discharge and satisfaction of all claims and demands which she then had against her husband in respect of the order of November 25, 1907, so far as it was thereby ordered that he should secure by deed to be settled by one of the Conveyancing Counsel of the Court the payment to her during their joint lives of the annual sum of 1400*l.* and to secure the payment of the annual sum of 1000*l.* to her for her life on the death of her husband and also that she would not at any time thereafter bring or take any action or proceeding whatsoever against her husband for the purposes of enforcing such provisions of the order of November 25, 1907, or any of them or otherwise in respect of such provisions or any of them. J. S. Burroughes died on January 29, 1912, having paid the annual sum of 1400*l.* to his wife without deducting income tax therefrom. On January 28, 1914, at the request of the trustees of the deed of July 20, 1909, the executors of J. S. Burroughes transferred into the names of the trustees investments authorized by law for the investment of trust funds of an amount sufficient to produce an income after deducting income tax at 1*s.* 2*d.* in the £ of 1000*l.* per annum. The residue of the trust premises were thereupon assigned to the executors and by a deed dated July 7, 1914, the executors released the trustees of the deed of July 20, 1909, from all liability in respect of the property subject to the trusts of the deed and of their dealings therewith. The tenth recital contained in the deed of release of July 7, 1914, stated that disputes had arisen between J. S. Burroughes and the plaintiff as to what security ought

to be given for the purpose of complying with the provisions of the order of November 25, 1907, relating to the annual payments of the 1400*l.* and 1000*l.* respectively mentioned in the order.

The executors of J. S. Burroughes paid to the plaintiff the annual sum of 1000*l.* free of income tax up to the date of the transfer in 1914 by them of the investments to the trustees of the deed of 1909, and since that time the trustees up to and shortly before the commencement of this action paid her the annual sum of 1000*l.* free of income tax, but to enable them to do this, in exercise of the powers vested in them by clause 16 of the deed of 1909, they raised a certain sum by sale of a sufficient part of the annuity fund.

The executors of J. S. Burroughes now alleged that the trustees of the deed of July 20, 1909, had no power to pay to the plaintiff the annual sum of 1000*l.* without first deducting therefrom income tax, as the agreement in that deed for the payment of the annual sum of 1000*l.* to the plaintiff in full without deducting income tax was in contravention of the prohibitions in the Income Tax Acts and therefore void.

The plaintiff brought this action against the present trustees of the deed of July 20, 1909, and the executors of J. S. Burroughes, claiming (1.) a declaration that upon the true construction of the deed of July 20, 1909, the trustees thereof held the trust funds and securities subject to the trusts thereof as security for the payment to the plaintiff of the annual sum specified and defined by the order of November 25, 1907—namely the sum of 1000*l.* free of income tax and (2.) in the alternative rectification of the deed of July 20, 1909, so as to provide that the trust funds and securities subject to the trusts of that deed should be held by the trustees thereof as security for the payment to the plaintiff of the annual sum specified and defined by the said order—namely, the sum of 1000*l.* free from income tax.

Ward Coldridge K.C. and *Mossop* for the plaintiff. The provision in the deed dated July 20, 1909, that the annuities thereby directed to be paid should be paid free of income

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tax is not caught by the prohibition contained in r. 23 (2.) (1) of the General Rules applicable to Schedules A, B, C, D and E to the Income Tax Act, 1918, and therefore the trustees must continue to pay the annuity of 1000*l.* to the plaintiff without any deduction therefrom of income tax: *Brooke* v. *Price*. (2)

If such provision does contravene the prohibition in r. 23 (2.) then the form in which the deed has been drawn so far as concerns that provision has not carried out the direction as to income tax contained in the order of November 25, 1907, nor the intention of the parties to the deed that the annuities should be received by the plaintiff without any deduction being first made for income tax, therefore the Court has jurisdiction to and will rectify the deed. The deed can be drawn so as to make the annuities payable free of income tax without thereby contravening the prohibition in r. 23 (2.), and it ought to be altered accordingly on the ground of mistake.

Jenkins K.C. and *J. N. Gray* for the trustees. The obligations imposed on the husband by the order of November 25, 1907, are effectively carried out by the deed of July 20, 1909, and there is nothing in the Income Tax Acts or rules to prevent the trustees of this deed from paying the annuity free of income tax. What was said in the judgments in *Brooke* v. *Price* (2) is applicable to the provision in this deed concerning the payment of the annuities free of income tax. Assume that that provision is put in a form which causes it technically to contravene the prohibition in r. 23 (2.) of the General Rules applicable to Schedules A, B, C, D and E to the Income Tax Act, 1918, then it is clear that all the parties intended that the deed should be so drawn as to carry out the order and allow of the trustees paying the annuities without any deduction therefrom of income tax. A mistake therefore having been made the Court has jurisdiction to rectify it and alter the deed so as to fulfil the intention of the

(1) Rule 23 (2.): "Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction is void."

(2) [1917] A. C. 115.

parties to it and carry out the directions in the order without the provision in the deed as to income tax thereby contravening the prohibition in r. 23 (2.). The fact that the deed was executed in pursuance of an order of the Court prevents it from being an agreement which contravenes the prohibition.

Owen Thompson K.C. and *Bryan Farrer* for the executors. The attempt which has been made in the deed of July 20, 1909, to cause the annuities to be payable to the plaintiff without first deducting income tax has failed, as in the form in which the provision as to income tax is drawn it is illegal, contravening the prohibition in r. 23 (2.) of the General Rules applicable to Schedules A, B, C, D and E to the Income Tax Act, 1918: see the line of cases commencing with *Floyer* v. *Bankes* (1) and ending with *Blount* v. *Blount* (2) and *In re Peck's Settlement.* (3) The last case is indistinguishable from the present. When the Court has to deal with a deed which follows an order it must deal with it in the same manner as any ordinary deed. The case of *Brooke* v. *Price* (4) was an exceptional case where the parties to the deed dealt with a tax-free fund and is distinguishable. That case has frequently been distinguished and was so distinguished in *In re Shaw* (5) and in *In re Cain's Settlement.* (6) This deed therefore being illegal this Court will not rectify it; a mistake of law will not be rectified. It was not a contract made in pursuance of the order of the Divorce Court as it was expressed to be made by way of a compromise between the parties to it and clause 18 prevents the plaintiff seeking rectification.

[P. O. LAWRENCE J. There has been an abortive attempt in this deed to carry out the terms of the order and the intention of the parties, and why should it not now be altered ?]

Ward Coldridge K.C. in reply. A different rule of law is applicable to a case such as this where there has been an order of the Court which was made in invitum and the prohibition of the Income Tax Acts is not applicable: *In re*

(1) (1863) 11 W. R. 630.
(2) [1916] 1 K. B. 230.
(3) [1921] 2 Ch. 237.
(4) [1917] A. C. 115.
(5) [1918] P. 47.
(6) [1919] 2 Ch. 364.

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Barry's Trusts. (1) The fact that this deed was executed under an order of the Court prevents it coming within the prohibitions in the Income Tax Acts and rules; it is not a deed which is a "contract covenant or agreement between the parties" within s. 103 of the Income Tax Act, 1842. It was a deed conceived solely for the purpose of giving effect to the order of the Court. *Booth* v. *Booth* (2) confirms the observations of Lord Parker in *Brooke* v. *Price.* (3) Clause 18 of the deed was inserted only because the parties thought that the earlier clauses had affected their intention and that under them the annuities were payable to the plaintiff free of income tax. If a mistake has been made in the form of the provision as to income tax in the deed so that it does, contrary to the intention of the parties, contravene the prohibition in r. 23 (2.) the Court will rectify it: *Wake* v. *Harrop* (4); *Welman* v. *Welman* (5), and though the mistake is one of law: *Stone* v. *Godfrey.* (6) *In re Peck's Settlement* (7) it is true is closely in line with this case, but can that case stand side by side with the judgment of Lord Wrenbury in *Brooke* v. *Price* (3) ?

Cur. adv. vult.

Nov. 17. P. O. LAWRENCE J. The facts of this case are not in dispute, and I need not recapitulate the agreed statement of them.

The first question to be decided is whether the provisions contained in clause 16 of the deed of July 20, 1909, purporting to confer upon the plaintiff the right to receive the annuity of 1000*l.* free of income tax are void so far as they relate to the tax on the ground that they contravene the prohibitions of s. 103 of the Income Tax Act, 1842, which is now replaced by r. 23 (2.) of the General Rules applicable to Schedules A, B, C, D, and E to the Income Tax Act, 1918.

The solution of this question depends upon whether the deed of July 20, 1909, falls within the class of permissible

(1) [1906] 1 Ch. 768, 772.
(2) [1921] W. N. 313.
(3) [1917] A. C. 115.
(4) (1862) 8 Jur. (N. S.) 845.
(5) (1880) 5 Ch. D. 570.
(6) (1854) 5 D. M. & G. 76.
(7) [1921] 2 Ch. 237.

agreements of which the settlement dealt with in *Brooke* v. *Price* (1) is an example, or whether it falls within the class of prohibited agreements of which the settlements dealt with in *Blount* v. *Blount* (2) and *In re Peck's Settlement* (3) are examples. It appears from the case of *Brooke* v. *Price* (1) that it is permissible for persons beneficially entitled to the net balance of the income of a trust fund after the income tax thereon has been deducted, to make a contract to divide such net balance between themselves so that one of them receives thereout a fixed annual sum free of income tax, provided that such contract does not purport to affect the right of the trustees, as the persons primarily liable for the tax, to deduct the tax against all their beneficiaries.

On the other hand the cases of *Blount* v. *Blount* (2) and *In re Peck's Settlement* (3), show that if the agreement is one to which the trustees in whom the capital of the trust fund is vested are parties and provides for the payment by the trustees of an annuity free of income tax out of the gross income of the fund, such agreement contravenes the prohibitions of the Income Tax Acts and the annuitant must submit to a deduction of the tax. If I have correctly stated the result of these decisions it is obvious that the deed of July 20, 1909, falls within the class of agreements governed by the decisions in *Blount* v. *Blount* (2), and *In re Peck's Settlement* (3), and not within the class of agreements governed by the decision in *Brooke* v. *Price*. (1) The trustees of the deed of 1909 in whom the capital of the trust fund is now vested are the persons legally entitled to receive the whole income of the fund and are primarily liable for the income tax payable in respect thereof; they are parties to (or are otherwise bound by the provisions of) the deed of 1909, and by that deed it is agreed that the annuity of 1000*l.* shall be paid by them to the plaintiff free of income tax out of the gross income, and in case of deficiency, out of the capital. The deed therefore purports directly to affect the right of the trustees to deduct the income tax from

(1) [1917] A. C. 115. (2) [1916] 1 K. B. 230.
(3) [1921] 2 Ch. 237.

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the plaintiff's annuity, and consequently contravenes the prohibitions of the Income Tax Acts.

The fact that the deed was executed in supposed obedience to an order of the Court does not in my opinion prevent it from being an agreement which contravenes the prohibitions of the Income Tax Acts, nor does that fact take it out of the mischief aimed at by those Acts. There can, I think, be no doubt that the Divorce Court had ample power to order the payment of the annuities free of income tax and to direct such payment to be secured by deed. The prohibitions of the Income Tax Acts do not apply to such an order: see *In re Shaw* (1), and it is admitted that a deed securing the payment of the annuities free of income tax could have been settled in such a form as not to contravene those prohibitions. In my judgment the order of November 25, 1907, does not operate as an authority to the parties to enter into a contract contravening the prohibitions of the Income Tax Acts nor has it the effect of validating those provisions of the deed which do in fact contravene such prohibitions.

In the result, for the reasons stated, I hold that the executors' contention must prevail and that the attempt to secure the payment to the plaintiff of an annuity of 1000*l.* free of income tax pursuant to the order of November 25, 1907, has failed.

The question then arises whether the plaintiff is entitled to have the deed of 1909 rectified. This deed was executed by the testator purporting to act in obedience to the order of November 25, 1907. The order was made against the testator in invitum and is unambiguous in its terms. It is suggested that because, after the order was made, disputes arose between the parties as to what security ought to be given by the testator for the purpose of complying with the order, and because such disputes were ultimately compromised, and such compromise was embodied in the deed, the deed ought to be treated as a contract entered into by the parties in substitution for the security ordered by the Divorce Court. I cannot accede to that suggestion. The disputes and

(1) [1918] P. 47.

compromise related solely to the nature and amount of the security to be given by the testator upon which subject the order was silent. After the making of the order there never was any question as to the amount or character of the annuities; these were fixed by the order, and were throughout the subsequent negotiations treated as definitely settled. If any corroboration of this fact be required, it is to be found in the tenth recital contained in the release of July 7, 1914. In these circumstances I have no hestitation in holding that the deed of 1909 was executed by all parties with the sole intention of complying with the order of November 25, 1907, and in the full belief that it had the effect of securing the payment to the plaintiff of the annuities free of income tax.

I am further of opinion that neither the direction in the order that one of the Conveyancing Counsel to the Court should settle the deed nor the fact that the deed of 1909 was settled by such counsel constitutes any bar to the relief now sought by the plaintiff. The Conveyancing Counsel had no authority or power to vary the amount or character of the annuities. His duty was strictly limited to the settling of a deed to secure the payment of the annuities specified in the order, and judging from the contents of the deed of 1909 I have not the slightest doubt that the Conveyancing Counsel (as well as the parties) believed that the deed as settled by him did in fact comply strictly with the order. But then it is said that the mistake made by the parties was a mistake in law and that the Court has no power to relieve against the consequences of mistakes in law. In my judgment the general proposition that the Court has no such power is unsound: see e.g., *Stone* v. *Godfrey* 1), but, be that as it may, the proposition in my opinion has no application to the facts of this case. I have no doubt whatever that according to the established rules of this Court there is ample jurisdiction to rectify the deed of 1909 so as to make it conform to the order of November 25, 1907, and carry out the clear intention of the Court and of all the parties to it.

Although laches, or even mere delay, may disentitle a

(1) 5 D. M. & G. 76; 2 Eq. R. 886.

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plaintiff to rectification of an instrument, yet the period of twelve years which has elapsed in the present case since the deed of 1909 was executed, is in my judgment sufficiently explained by the fact that the testator during his lifetime, and his executors after his death up to shortly before the commencement of this action, have treated the deed of 1909 as validly securing the payment to the plaintiff of the annuities free of income tax, and both the testator and his executors have accordingly paid (or treated the plaintiff as entitled to the payment of) such annuities in full. In these circumstances the delay in my judgment affords no defence to the claim for rectification.

It was further contended that the plaintiff is precluded from obtaining the relief which she seeks by reason of the provisions of clause 18 of the deed of 1909. In my judgment this contention cannot prevail. It is obvious (and I shall assume it to be the fact) that clause 18 was inserted and agreed to by the plaintiff on the footing and in the belief that by the earlier clauses of the deed the payment of the annuities free of income tax had been secured to her in accordance with the order of November 25, 1907. In these circumstances I am clearly of opinion that clause 18 does not operate so as to preclude the plaintiff from enforcing her right to have the earlier clauses put into proper form in order to make them conform to the order and effectuate the intention of the Court and of the parties.

In the result I hold that the plaintiff is entitled to the relief claimed by the second paragraph of the prayer to the statement of claim.

In the course of the trial I intimated to the parties that I entertained serious doubts as to whether this Court was the proper tribunal to make an order for the rectification of the deed of 1909. My reason for those doubts was that as the Divorce Court was the tribunal which had ordered the deed to be settled and executed it might be said that the Divorce Court was the proper tribunal to deal with any question of rectification. Counsel for the executors did not seriously contest that this Court has jurisdiction to entertain and

determine the claim for rectification, but even so, the question remained whether it was proper that such jurisdiction should be exercised. As, however, all parties were desirous of avoiding the expense and delay of making an application to the Divorce Court I allowed the case to proceed on the footing that before giving judgment I would consult the President of the Probate, Divorce and Admiralty Division, and ascertain his views on the point. This I have now done and the learned President has informed me that he thinks that it is very desirable that the parties should not be put to the cost of a separate application to the Divorce Court for the purpose of rectifying the mistake which seems to have been made in carrying out the order of November 25, 1907, and that offhand he thinks that I have jurisdiction to deal with the matter as an incident of the cause tried before me; he also added that, if any consent of his were thought to be useful, he gave it. In view of the opinion expressed by the learned President, I no longer feel any hesitation in dealing with the claim for rectification. Accordingly, I propose to make first a declaration that the provisions of clause 16 of the deed of 1909 purporting to secure the payment to the plaintiff of the annuity of 1000*l.* free of income tax contravene the prohibitions of the Income Tax Acts, and are void so far as they relate to the tax, and secondly, a declaration that the plaintiff is entitled to the rectification of clause 16 so as to provide that the trust fund now subject to the trusts of that clause shall be held by the trustees as security for the payment to the plaintiff of the annual sum of 1000*l.* free of income tax and there will be an order that the deed of 1909 be rectified accordingly.

I have throughout this judgment dealt only with the provisions of clause 16, because that is the clause which is now in operation, but my judgment applies with equal force to the provisions of the earlier clauses of the deed of 1909 in so far as they purport to secure the payment to the plaintiff of the annuities of 1400*l.* and 1000*l.* therein mentioned free of income tax. As, however, these annuities were paid in full there seems to me to be no object in going through the form

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of rectifying these earlier provisions. It follows, however, that in my judgment all payments made to the plaintiff in respect of her annuities by the testator during his lifetime and by his executors up to the date of the transfer of the trust fund to the trustees as well as all payments made by the trustees since that date were rightly made.

There remains the question how the costs of the action ought to be borne. None of the parties are in any way responsible for the unfortunate mistake which has been made. In these circumstances I think that the proper course to adopt is to make an order that the trustees of the deed of 1909 do raise and retain their own costs of this action (to be taxed as between solicitor and client) out of the capital of the trust fund, and to make no order as to the costs of the plaintiff or of the executors; the latter will no doubt be entitled to take their costs out of the testator's estate, as in my opinion they were fully justified in defending this action, but as I am not administering that estate I can make no order to that effect in this action.

As to rectification, the best form of order will be that the deed of 1909 be rectified by striking out clause 16 and by substituting in place thereof the clause set forth in the Schedule, and wherever the annuities of 1400*l.* and 1000*l.* are mentioned in it, describe them as such an annual sum as after the deduction of income tax will leave the fixed sum of 1400*l.* or 1000*l.*, as the case may be—adopting Lord Parker's definition of what is permissible in *Brooke* v. *Price*. (1)

The order as to rectification was settled in Court on December 6 and is as follows:—

And this Court doth declare that clause 16 of the deed of July 20, 1909, ought to be rectified so as to give effect to the order of the Probate, Divorce and Admiralty Division dated November 25, 1907.

And it is ordered that clause 16 of the said deed be rectified accordingly by striking out such part thereof as is set forth in Part I. of the Schedule hereto and by substituting for the

(1) [1917] A. C. 115, 124.

part so struck out the provisions set forth in Part II. of the said Schedule.

The Schedule above referred to :—

PART I.

And it is hereby declared that the trustees shall stand possessed of the investments so transferred to them upon trust out of the annual income thereof to pay to the said Agnes Vivienne Vincent Burroughes the said respective yearly sums of 1400*l.* and 1000*l.* in both cases free of income tax at the times and in manner aforesaid and that if the income of the investments so transferred shall at any time and from any cause whatever prove insufficient for the payment of such yearly sums respectively in full resort may be had to the capital thereof from time to time to make good such deficiency and the surplus income (if any) of the said investments from time to time remaining after payment of such yearly sums respectively and after the death of the said A. V. V. Burroughes the capital of the same investments shall be held in trust to replace any capital that may have been withdrawn and to satisfy any future deficiency and subject thereto for the said James Samuel Burroughes absolutely.

PART II.

It is hereby declared that the trustees shall stand possessed of the investments so transferred to them upon trust out of the annual income thereof to pay to the said Agnes Vivienne Vincent Burroughes the following sums :—

(*a*) If such transfer shall be made during the joint lives of the said James Samuel Burroughes and A. V. V. Burroughes such a sum in every year during such joint lives as after the deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 1400*l.* And after the death of the said J. S. Burroughes such a sum in every year during the remainder of the life of the said A. V. V. Burroughes as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 1000*l.*

(*b*) If such transfer shall be made after the death of the

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said J. S. Burroughes such a sum in every year during the remainder of the life of the said A. V. V. Burroughes as after the deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 1000*l.* And if the income of the investments so transferred shall at any time and from any cause whatever prove insufficient for the payment of such yearly sums respectively in full resort may be had to the capital thereof from time to time to make good such deficiency and the surplus income (if any) of the said investments from time to time remaining after payment of such yearly sums respectively. And after the death of the said A. V. V. Burroughes the capital of the same investments shall be held in trust to replace any capital that may have been withdrawn and to satisfy any future deficiency and subject thereto for the said J. S. Burroughes absolutely.

Solicitors: *B. Trayton Kenward; W. J. Fraser & Son; Elkin, Henriques & Harford, for W. T. de B. Barwell, Seaford.*

G. P. L.

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In re JUBILEE COTTON MILLS, LIMITED.

[00142 of 1921.]

Company—Promoters—Secret Profit—Shares and Debentures—Allotment before filing Statement in lieu of Prospectus—Validity—Realization—Worthless Shares—Profit obtained by fraudulent unloading—Promoters' liability to account—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 82.

The promoters of a company, formed to purchase a business, obtained a large number of fully paid shares and debentures forming part of those originally allotted to the vendor as the ostensible consideration for the purchase, which consideration was, without the company's knowledge, overstated in the purchase agreement adopted by the memorandum and articles.

These shares and debentures were in fact allotted to the vendor before any statement in lieu of prospectus was filed under s. 82 of the Companies (Consolidation) Act, 1908, so that according to certain dicta in *In re Blair Open Hearth Furnace Co.* [1914] 1 Ch. 390 the allotment was wholly void.

In addition to this defect, although the debentures were worth about 90 per cent. of their face value, the shares were absolutely worthless.

The promoters however not only realized the debentures at their

proper market value, but by means of fraudulent unloading obtained a considerable sum for the worthless shares.

The company was subsequently wound up compulsorily:—

Held, that whether or not the allotment was void, as to which the Court expressed no opinion, the promoters had in fact made a secret profit out of the shares and debentures purported to be allotted, and that they were therefore accountable to the official receiver as liquidator for this profit.

Held, also, that the fact that a large part of this profit was obtained by the fraudulent unloading of the worthless shares was no answer to the official receiver's claim to the whole of it.

Observations on s. 82.

MISFEASANCE SUMMONSES.

On November 29, 1919, Fletcher agreed to sell the Jubilee Mill at Todmorden, Manchester, to Ernest Terah Hooley and Macdonald for 55,000*l.* made up of 20,000*l.* cash and 35,000 1*l.* shares in a company to be formed with a capital of 90,000*l.* to carry on the business.

He was then only a yearly tenant, but at the purchasers' direction he entered into a contract to buy the freehold for 8750*l.* on their behalf and paid a deposit of 875*l.* which they provided.

This purchase was not yet completed.

On December 4, 1919, Lewis and Demery arranged with Wallis, a solicitor purporting to act for Fletcher, but really acting for Hooley, that Lewis should acquire the mill from Fletcher for 40,000*l.* (including 10,000*l.* for the freehold) and 55,000 fully paid shares in a company that Demery was to promote with a capital of 150,000 1*l.* shares and 30,000*l.* mortgage debentures. It was arranged that 75,000 fully paid shares and the debentures should go to Lewis and 20,000 fully paid shares to Demery, to whom the promotion and details of the company were left as Lewis's authorized agent. All shares sold were to be pooled. Lewis then gave Demery a cheque for 15,000*l.* on account. The 30,000*l.* debentures were meant to cover Lewis's outlay apart from the freehold, and he was ultimately to be placed in ample funds to see the business through, if he advanced the money. There was no proof that he knew of the previous sale. An estate agent, Newton, a friend of Hooley's and

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afterwards one of the signatories, was present when these arrangements were made.

On December 5, 1919, Wallis agreed to sell the freehold to Demery for 10,000*l.*, Demery paying a deposit of 1000*l.* (subsequently refunded by Lewis) and agreeing to pay the 9000*l.* balance on completion.

Wallis also agreed to sell the stock, plant and machinery in the mill as a going concern for 30,000*l.* cash and 55,000 shares in a company to be forthwith formed with a capital of 150,000 1*l.* shares and 30,000*l.* debentures. Demery handed over Lewis's cheque for 15,000*l.*, the balance to be paid within twenty-eight days.

The promotion then proceeded. The draft memorandum and articles were signed by Lewis and Demery shortly after December 19, 1919, and the final form was signed by the seven signatories on December 31 with the knowledge of Lewis and Demery. On December 29 Lewis sold his potential holding to Hooley, but this sale was never completed, and was ultimately cancelled on January 28, 1920. Lewis did not withdraw Demery's authority, but allowed the promotion to go on.

On January 6, 1920, the company was registered with a capital of 150,000 1*l.* shares, the signatories being Fletcher, Macdonald, Newton and four others. The object, as stated in the memorandum, was to acquire and carry on the business of the Jubilee Cotton Mills and with a view thereto to enter into an agreement already prepared between Fletcher and the company and identified by the signature of two signatories.

Art. 2 provided that the directors should forthwith consider and if approved enter into the agreement with or without modification and no objection should be taken to the agreement, nor should any promoter or director be liable to account for any profit derived under the agreement by reason of any promoters or directors being vendors or otherwise interested in the agreement, or of the board of directors not being an independent board; but every member of the company present and future should be deemed to have notice

of the provisions of the agreement and to have assented to the terms thereof.

By this agreement dated January 6, 1920, after reciting that Fletcher was seised of the freehold and possessed of the plant, stock in trade and assets of the business Fletcher agreed to sell the freehold and the business and goodwill and the plant stock and assets to the company for 179,900*l.*, of which 10,000*l.* should represent the value of the freehold, 159,900*l.* the plant, and 10,000*l.* the goodwill. The sum of 179,900*l.* was to be satisfied by the allotment to the vendor of 149,900 fully paid shares and the issue to him of 30,000*l.* first mortgage debentures.

The recital as to the freehold was untrue. It was suggested that the agreement which was prepared by Wallis was made between Fletcher and the company direct to save double stamp duty, but the Court held that it was also intended to avoid the disclosure of Lewis's name as vendor, if such he was.

The first board meeting was held on the same day in Hooley's rooms at the Midland Hotel, Manchester, in the presence of Hooley, Lewis, Fletcher and Macdonald, the last two having been appointed the first directors by a majority of the signatories.

Although no statement in lieu of prospectus had been filed under s. 82 of the Companies (Consolidation) Act, 1908 (1), the following business was transacted.

Fletcher was appointed chairman, Wallis and Starkie solicitors, and Fletcher's son (who was not present) and Demery additional directors. The agreement was ordered to be sealed and the debentures issued.

The shares were allotted as follows—namely, 149,900

(1) Sect. 82, sub-s. 1: "A company which does not issue a prospectus on or with reference to its formation, shall not allot any of its shares or debentures unless before the first allotment of either shares or debenture there has been filed with the registrar of companies a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the second schedule to this Act."

Sub-s. 2: "This section shall not apply to a private company."

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fully paid shares to Fletcher under the agreement and 45 fully paid shares for cash, being 10 shares apiece to the 4 directors and 1 share apiece to Newton and the other four non-director signatories, leaving 55 shares unissued.

A temporary debenture for 30,000*l.* was issued to Fletcher, but on January 28, 1920, this was exchanged for 300 debentures of 100*l.* each, of which he was the registered holder.

Fletcher, who was not versed in company matters, apparently treated the agreement of January 6, 1920, as part of the machinery for carrying out his agreement of November 29, 1919. He received his 20,000*l.* cash, but he only retained the 35,000 shares agreed to be given him under that agreement and signed blank transfers of the rest in blocks of 5000 shares. In the result Lewis received 75,000, Demery 20,000, and Hooley and his associates 19,900 shares.

The debentures with a blank transfer were subsequently handed to Lewis, but the transfer was not lodged for registration. The debentures were worth about 90 per cent. of their face value, but the shares were worthless.

At the same meeting Lewis paid Wallis 15,000*l.*, the balance due on the mills contract, leaving 9000*l.* due on the freehold. The result of all this was, as the Court stated, that apart from the consequences of omitting to file a statement in lieu of prospectus under s. 82 the company came into existence with the shareholders above stated. There was no proof however that Fletcher's son or the four non-director signatories had any knowledge of the interest of Lewis, Demery, Hooley or Macdonald in the 149,900 fully paid shares issued to Fletcher as part of the so-called 179,900*l.* purchase price. Fletcher in fact only received 20,000*l.* out of Lewis's 31,000*l.*, and 35,000 fully paid shares, i.e., the purchase price under his contract with Hooley and Macdonald, his only real agreement. Hooley and his associates received 11,000*l.*, the balance of the cash and 20,000 (less 100) shares. Lewis received 75,000 and Demery 20,000 shares. Lewis also received the 30,000*l.* debentures in repayment pro tanto of the 31,000*l.* cash and 9000*l.* liability for the freehold. The

net result of this juggling was that notwithstanding the further secret profit made by Hooley and his associates out of the purchase consideration apparently so made payable to Fletcher, Lewis succeeded in promoting through Demery, as he all along intended to do, a company which was to be made to buy, or agree to buy, the mills for a sum not exceeding 180,000*l.*, out of which Lewis and Demery were to obtain their secret profit, and out of which they received the shares and debentures that they so bargained for.

The 10,000*l.* purchase price of the freehold was ultimately to be borne by Hooley and Demery and they in fact paid Lewis 2500*l.* on account thereof.

The statement in lieu of prospectus was not filed till March 18, 1920. It stated that the capital was 150,000*l.* in 1*l.* shares, and that 149,900 fully paid shares and 300 debentures of 100*l.* had been issued by Fletcher as vendor in accordance with the agreement for sale of January 6 in payment of the total purchase price of 179,900*l.* and that nothing had been or was intended to be paid to any promoter. In giving particulars of the directors' interests in the promotion or property acquired it merely stated that Fletcher was interested as vendor. This statement was prepared by Wallis and signed by the four directors on February 5, 1920, apparently without reading it.

In the meantime Lewis and Demery, in conjunction with and with the assistance of Hooley who had made grossly false and fraudulently exaggerated statements as to the company's position and prospective profits, had realized their worthless shares in the market at a considerable sum. Lewis had sold his entire holding during the period from January 13 to February 26, 1920, and had received in cash or property accepted by him in lieu of cash the sum of 38,890*l.* for his shares and 27,500*l.* for his debentures (the latter sum being their approximate value), making a total of 66,390*l.* against his 31,000*l.* outlay. Demery had sold his 20,000 shares before March 10, 1920, but his receipts were not yet ascertained. He had spent 826*l.* 11*s.* for promotion expenses, with which he was entitled to be credited.

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The debentures with the blank transfer were now in the hands of Thomas Isherwood & Co., bona fide holders for value without notice of any irregularity. They had paid 27,500*l.* or allowed it in account, but they had not lodged their transfer for registration, so that the debentures still stood in the name of Fletcher the registered holder.

On March 15, 1921, a compulsory winding-up order was made on a contributory's petition.

On March 23, 1921, the official receiver as liquidator issued a summons against Lewis and Demery for a declaration that they were promoters on and after December 4, 1919, and accountable for their profits on the purchase and resale of the Jubilee Cotton Mills, and also liable to damages, on the ground that they concealed their promotion profits and that the sale to the company was at a grossly excessive price and a fraud on the company.

He also issued a summons against the two Fletchers and Demery and Macdonald for damages for their negligence as directors (inter alia) in relation to the purchase and in relation to the concealment of the promotion profits.

He also issued a summons against Fletcher and Thomas Isherwood & Co. for a declaration that the debentures were invalid on the ground that they formed part of the concealed promotion profits, that Fletcher had given no consideration for them, and that their issue was invalid under s. 82.

Lewis's main defence was that he was not a promoter of the company actually formed, as he merely arranged to promote a private company in which Demery, Fletcher and himself or their nominees should have all the shares. He also said that the sale of his potential holding on December 29, 1919, was an implied revocation of Demery's authority, and that in any case Demery had exceeded his authority. He also said that he was only present at the meeting of January 6, 1920, for about fifteen minutes, and took no part in it beyond signing cheques of 5000*l.* and 10,000*l.* for Wallis. These points failed on the evidence.

Lewis and Demery also contended that having regard to s. 82 the shares and debentures purported to be issued were invalid, so that the official receiver could not base any claim thereon. They also contended that in any case the official receiver could not claim profits that he himself alleged were merely obtained by fraudulent unloading of the shares, and which apart from that fraudulent unloading would never have come into existence.

The arguments on the latter points are alone reported.

The first two summonses were heard together and judgment was reserved.

The third summons was then heard and ultimately compromised, but as the respondents' argument on s. 82 was more fully developed on that summons it has been inserted in this report.

Patrick Hastings K.C., *Wallington* and *G. Ansley* for the official receiver. The facts speak for themselves. Lewis and Demery arranged the promotion the day before they bought the mill property. They are both clearly promoters ab initio. They are accountable for their concealed profits, and the directors are liable for negligence : *Carling's Case* (1) ; *Gluckstein* v. *Barnes*. (2)

Tomlin K.C., *C. J. Mathew K.C.*, *Dighton Pollock* and *G. R. B. Whitehead* for Lewis. Assume that Lewis fails on the evidence and was in fact a promoter and in a fiduciary position ab initio to this company, and that it had independent shareholders, what were his concealed profits ? He took nothing out of the coffers of the company. He only took shares and debentures. The shares may be left out of consideration, as they only represented the profit to be gained from working the mills " or from the credulity of the public " : *Bentinck* v. *Fenn* (3) ; *In re Brazilian Rubber Plantations and Estates*. (4)

But these so-called shares and debentures were in fact void under s. 82 : *In re Blair Open Hearth Furnace*

(1) (1875) 1 Ch. D. 115, 126.
(2) [1900] A. C. 240.
(3) (1887) 12 App. Cas. 652, 671.
(4) [1911] 1 Ch. 425, 436.

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Co. (1) How can the official receiver base any claim on them ?

Even if, notwithstanding the clear dicta in the above case, the issue is treated as valid, what is the result ? Lewis provided 31,000*l.* cash for the company and received 30,000*l.* debentures worth 27,500*l.* and 75,000 shares which were really valueless. It is true that the shares in fact realized a large amount. But that was obtained by fraudulent unloading. The amount could no doubt be recovered by the defrauded purchasers. But surely it is not a "profit" that the official receiver can claim for the company, which could only have obtained it by availing itself of the same frauds. *In re Ambrose Lake Tin and Copper Mining Co.* (2)

In *Carling's Case* (3) and *Gluckstein* v. *Barnes* (4) the Courts were dealing with genuine profits for which the promoters or directors were accountable to the company. They were not dealing with moneys merely obtained by fraudulent unloading.

Again, the official receiver's remedy is strictly in damages. In an ordinary case the damages are no doubt measured by the amount of the promoters' secret profits, of which it is assumed that the company has been deprived : *In re Leeds and Hanley Theatres of Varieties.* (5)

But how can such a measure be applied to profits of this nature, which, ex hypothesi, the company could never have obtained ? The damages are purely nominal.

Jenkins K.C. and *Roope Reeve* for Demery. It is possible that shares in the hands of bona fide holders for value without notice may be valid notwithstanding s. 82. But as between Demery and the official receiver representing the company the allotment was wholly void. The official receiver cannot base any claim on a void and illegal allotment.

The only effect of the non-disclosure was that too many shares were issued. But they were worthless and in the circumstances the company suffered no damage.

If the official receiver is entitled to treat the proceeds

(1) [1914] 1 Ch. 390, 399, 408, 412.
(2) (1880) 14 Ch. D. 390, 395.
(3) 1 Ch. D. 115, 126.
(4) [1900] A. C. 240.
(5) [1902] 2 Ch. 809, 825, 833.

of fraudulent unloading of these worthless shares as genuine profits, he can no doubt claim them as such, but in that case the remedy of the defrauded purchasers against their vendors will be practically nugatory.

Norman Birkett and *Lewey* for the two Fletchers, and Macdonald in person adopted the above respondents' arguments.

Luxmoore K.C. and *Henry Johnston* for the present debenture holders. Assuming that we are bona fide holders and entitled to be registered the company is estopped from setting up s. 82 against us: *Webb* v. *Herne Bay Commissioners.* (1)

Suppose however that s. 82 can be set up, what is its history? It first appeared in the Companies Act, 1907 (7 Edw. 7, c. 50), s. 1, sub-s. 1. Sub-s. 4 incorporated s. 5 of the Companies Act, 1900 (63 & 64 Vict. c. 48), under which the allotment was voidable at the instance of the applicant and the directors were liable to compensate the company and the allottee. Under those provisions the allotment was clearly voidable, not void.

Then came the 1908 Act, which as a consolidation Act was not intended to alter the law.

Sect. 86 was obviously intended to replace s. 5 of the Companies Act, 1900, but it only refers to an allotment in contravention of s. 85, which it renders voidable at the instance of the applicant. It does not refer to s. 82.

Sect. 87, sub-s. 1, however provides that a company shall not commence any business unless (*d*) in the case of a non-prospectus company a statement in lieu of prospectus is filed and (sub-s. 2) the registrar is not to give his certificate until that is done.

Sub-s. 3 provides that any contract made by a company before the date at which it is entitled to commence business shall be provisional only and shall not be binding on the company until that date, and on that date it shall become binding.

Now an application and allotment constitute a contract: *In re Blair Open Hearth Furnace Co.* (2); which therefore

(1) (1870) L. R. 5 Q. B. 642. (2) [1914] 1 Ch. 390, 408.

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becomes binding the moment the company is entitled to commence business: see Buckley on Companies, 9th ed., p. 199. The allotments therefore became valid on March 18, 1920, when the statement was filed.

Again, statutes are not construed to impair obligations, so that even if s. 82 had made the allotment null and void for all purposes whatever, it would still be only voidable: Maxwell on Statutes, 6th ed., pp. 368–381; *Edwards* v. *Dick* (1); *Lodge* v. *National Union Investment Co.* (2); *In re Suarez.* (3)

These points were not taken or dealt with in *In re Blair Open Hearth Furnace Co.* (4) and the dicta require reconsideration accordingly.

Patrick Hastings K.C. in reply. On the question of secret profits, the point on s. 82 does not really arise. Whatever Lewis and Demery obtained—valid share certificates and debentures, or mere pieces of paper—they sold them at a profit, for which they must account.

The fact that in the case of the shares they are probably liable in damages to the purchasers they defrauded, is no defence to the official receiver's claim in this action.

Cur. adv. vult.

Nov. 28. ASTBURY J. [after stating the facts]. The undisputed facts are eloquent in themselves and except in the case of Lewis, Fletcher, and his son, little more need be said about them. Fletcher's son is not shown to have had any real part in the matters complained of and no relief is now asked against him.

The principal difficulty, if any, arises with regard to Lewis. The case is an anxious and important one for him, his character and honesty being involved, and I have given it the closest attention, especially having regard to the favourable view of his truthfulness formed by Russell J. on February 24, 1921, in *Marple* v. *Hooley* [1920 M 2915]. (5)

(1) (1821) 4 B. & Al. 212, 214, 217.
(2) [1907] 1 Ch. 300, 306.
(3) [1918] 1 Ch. 176, 199.
(4) [1914] 1 Ch. 390, 408.
(5) Unreported.

But the undisputed facts now established place him in an unenviable position.

On December 4, 1919, he agreed to promote a company with a capital, all to be issued, grossly in excess of anything he could possibly have considered justifiable. He was to receive as a profit for himself and his agent Demery 95,000 fully paid shares. If he had intended to retain them as an investment their number would have been of little moment, but he intended nothing of the kind. He agreed to the venture with the admitted object of realizing his holding, not caring who was to be induced to buy what he never dreamt of retaining for himself. He made no real attempt to ascertain the value of the mill, and shortly after, when he learned that Hooley, whom he knew to be a rogue, was busying himself in the matter, and he became suspicious of Demery, he made no further investigations with a view of learning the true facts, and in no way withdrew or modified the authority he had given to Demery to proceed with the promotion. All he cared about was that the promotion should go on in order that he might realize or obtain the proceeds of sale of his interest in the company. The value of the mill and the identity of the vendor were quite minor matters as far as he was concerned. He took no steps to insure that his profit on his so-called resale to the company should be disclosed, so that intending purchasers of his shares might be in a position to learn the facts. He says he thought that he, Fletcher and Demery would be the only shareholders ; but this could only be so till their shares were sold. He allied himself closely with Hooley and Demery. On January 6, 1920, he learned that there were a number of directors, and that he was not one. He knew that he had not executed any agreement for sale to the company, and that Fletcher must have done so, as he obtained his shares by blank transfers from Fletcher, the meaning of which he thoroughly understood. He knew that the company's shares which he, Hooley, Demery and Fletcher were some or all of them selling were being raised to a wholly unjustifiable price and were being dealt with in the market and he made

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no objection or protest. This conduct fell far below the minimum standard to which an honest man could in any circumstances conform. [His Lordship then referred to the conflicting evidence of Lewis and his secretary on the one hand and Demery, Macdonald and Fletcher on the other hand as to the part Lewis took at the meeting of January 6, 1920, and on other matters as to which, without relying on the evidence of Demery or Macdonald, he preferred the evidence of Fletcher to that of Lewis. His Lordship continued :] Fletcher, who never trafficked with his shares beyond selling 15,000 of them to Hooley for roubles, more or less worthless, was guilty of gross negligence and breach of duty as a director, but he was not a knave in connection with the Jubilee Company.

Taking Lewis's evidence and the documents however alone I am quite satisfied that he knew all about the company he promoted through Demery. The only relevant thing that he is not shown affirmatively to have known anything about is Fletcher's agreement for sale to Hooley and Macdonald. If he had found this out, while restitution was possible he could perhaps have rescinded the contracts of December 4 and 5, 1919. But now it is too late and he is relegated to such relief in damages for fraud against Hooley, Wallis and Demery as he may be entitled to.

The result is that Lewis became with Demery on December 4 a promoter of the company that was in fact registered. Demery in registering it acted within the scope of his continuing authority, and Lewis, with knowledge (1.) that Fletcher was conveying direct to the company, (2.) that he, Lewis, was to obtain his agreed secret profit through and from Fletcher, and (3.) with knowledge of the nature and constitution of the company, was, subject as above mentioned, an assenting party throughout to what was in this connection done. Both Demery and Lewis were guilty of a breach of their fiduciary duty to the company in making and concealing from it their promotion profits, and this is none the less so because Hooley, another promoter, and perhaps Macdonald—who denies it—were also

making further concealed profits at the expense of the company.

In *Carling's Case* (1) Mellish L.J. said: "But what is the consequence of the breach of trust . . . . ? There certainly are three things, any one of which the company might do. They might say, in the first instance, 'These shares never ought to have been allotted to the directors at all'; and if they were now valuable shares they could say, 'Transfer them back to us, for you never were entitled to them.' Secondly, if the directors had sold the shares and made a large profit out of them, the company could have said, 'Those shares were our shares, you were trustees for us, and therefore you shall hand over to us the entire profit you have made by selling them'; and, thirdly, the company might say, 'Although you have made no profit by selling these shares, yet, by having had them allotted to you, you deprived us of the power of allotting them to other persons, therefore you must pay us the sum which we have lost by reason of our being deprived of the right of allotting those shares to other persons who would have paid them up.' Of these three remedies the liquidators may, in my judgment, take whichever is most beneficial to the company. But can they do more? Can they say, 'Although the shares which you have taken, which were the property of the company, were absolutely worthless or worth very little, both at the time when you took them and ever since, nevertheless, inasmuch as nominally they were 100*l.* shares, we will make you liable for that full sum of 100*l.* on each share'? In my judgment that would be inflicting an arbitrary punishment on a trustee for his breach of trust. It would not be indemnifying the cestui que trust for the injury he had sustained, but would be giving him a sum which, if the breach of trust had never been committed, he would not have acquired. This appears to me to be in principle wrong."

The official receiver seeks to enforce under this first summons as against Lewis and Demery the remedy secondly referred to by the Lord Justice.

(1) 1 Ch. D. 115, 126.

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I will now refer shortly to the legal arguments adduced on behalf of Lewis and Demery, their case on the facts being quite hopeless. It is said that if all the shareholders of a company know the facts and assent to what is done, it is immaterial into how many shares their interests are split up, and that if promoters purchase property before they become such, and resell to the company at a profit, the company cannot affirm the contract made with it and recover the profits made by their vendors: see *In re Ambrose Lake Tin and Copper Mining Co.* (1) These propositions are not disputed, but they do not apply to the present case. The whole of the shareholders here did not know of and assent to the over-capitalisation and the payment of the promotion profits, and Lewis did not buy the mill before he became a promoter, if he really bought it at all, but as part of a scheme to promote a company solely with a view of making undisclosed profits, and in fact he never sold to the company at all, but assented to a sale by Fletcher or in Fletcher's name direct, to effect his wrongful purpose.

In *In re Cape Breton Co.* (2) the respondents' above contention is very clearly expressed. In that case, promoters having purchased property before becoming such, subsequently sold to the company at an enhanced price. The company affirmed its purchase and claimed, not secret profits, but damages, as being the only way in which the difference in price could be claimed. Fry L.J. said: "This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal. Nor is this the case of a man who accepts an agency to buy some article in the market, and then sells to his principal his own goods, in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him so to do.

(1) 14 Ch. D. 390. (2) (1885) 29 Ch. D. 795, 811.

This case is distinguished from that, by there being a direction to buy a specific property. Nor, again, is this the case of an agent who, by any subsequent acts of his own, has rendered the rescission of the contract by his principal impossible. I express no opinion whether or no, in that case, the principal would have a right against the agent, notwithstanding the non-rescission of the contract. This is a case in which the agent, before accepting the agency, had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt. The option which the principal had, has in this case been exercised by confirming the contract with knowledge of the facts, and the question is whether, after that affirmance, the agent is liable in any sum to his principal. There is no authority which determines this point, and it, therefore, is to be determined upon principle. Now, notwithstanding the very powerful criticisms of Bowen L.J. on the judgment of Pearson J., I think that judgment right. I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess, I do not understand. It is said that, notwithstanding the ratification of the contract, the principal may claim some profits from the agent because those profits were made surreptitiously or clandestinely. It appears to me that the answer to that is this, that whatever the profits are, and however they are to be

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measured, those profits result, not from the original contract, but from the affirmance of the contract by the principal, and that, therefore, the profits which are made by the agent are neither clandestine nor surreptitious."

In the present case there are not two contracts and there has been no affirming of one of two contracts by the company with knowledge of any of the facts relied upon by the liquidator; nor am I proposing to deal with any claim for damages as such, but with a case solely of fiduciary agents seeking improperly to retain as against their principals profits made by them by secretly possessing themselves of and realizing property belonging not to themselves, but to their cestui que trust; and the doctrine expounded in the *Cape Breton Case* (1) has no application on the facts.

The mere purchase of property by a person who contemplates subsequently promoting a company does not, of itself, make him a promoter: *Ladywell Mining Co.* v. *Brookes* (2); *Erlanger* v. *New Sombrero Phosphate Co.* (3) But this again has no application to the action of Lewis and his agent in the present case. Persons who purchase property and then create a company to purchase from them the property they so possess stand in a fiduciary position towards that company and must faithfully state to the company the facts which apply to the property and which would influence the company in deciding on the reasonableness of acquiring it, and must provide the company with a board of directors capable of arriving at an honest and independent decision.

The respondents' further contention that the basis of the December 4 transaction was that Fletcher's minimum price was 95,000*l.*; that Demery's authority was only to form a company on that basis; that in any case his authority ceased when Lewis sold his interest in the venture in December, again does not square with the facts as now proved.

(1) 29 Ch. D. 795, 811. (2) (1887) 35 Ch. D. 400.
(3) (1878) 3 App. Cas. 1218.

It is then said that I ought to infer that none of the cash shares allotted to Fletcher's son and the signatories were allotted to independent people, but to nominees of Hooley and Demery with knowledge of the true facts, express or to be inferred, and that therefore there was sufficient disclosure to all the shareholders. The company, however, is in law a legal "persona," and it is of vital importance in the administration of the law relating to limited liability companies that their promotion should as far as possible be kept clean and honest, and I decline, in favour of such people as were concerned in the promotion of this company, to infer facts in their favour which they have not even attempted to prove, and which could have been proved by them had they been as they ask me to infer: see *In re British Seamless Paper Box Co.* (1); *In re Darby.* (2)

It is further said by the respondents that an agreement to purchase for cash and shares in a company to be formed by the purchaser does not necessarily make him a promoter: *Gover's Case.* (3) I respectfully agree.

Next it is said that qua damages as distinct from a claim to recover illicit profits, the liquidator cannot claim to recover anything in respect of the value of the 95,000 shares taken by the promoters because no such value existed, and that unless the company had been itself minded to practise the same kind of frauds as are attributed to Hooley, those shares could not have been turned into money. Again I agree. The shares were worthless.

The last contention on behalf of these respondents is a strange one, having regard to the part they played in the promotion of the company. It is said that under s. 82 of the Companies (Consolidation) Act, 1908, the issue of the shares and debentures in question was invalid and that they never existed in law, because no statement in lieu of prospectus was filed before the first allotment of shares on January 6, 1920. [His Lordship read the section.]

In support of this last contention certain dicta of

(1) (1881) 17 Ch. D. 467, 476. (2) [1911] 1 K. B. 95, 103.
(3) (1875) 1 Ch. D. 182.

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Warrington J. and two members of the Court of Appeal in *In re Blair Open Hearth Furnace Co.* (1) are relied on. In that case, however, the point before me did not arise for decision, the issue being the effect of a statement in lieu of prospectus which had been in fact filed before the first allotment, but which contained misstatements and omissions. The dicta relied upon are as follows. Warrington J. in the Court below said (2): "The argument on behalf of the applicants is that, if the statement so filed contains an inaccurate statement . . . . then it is not a statement within the meaning of the section, and . . . . the allotment of the shares by the company is illegal and therefore void. I am inclined to agree with that argument to this extent, that if no statement at all is filed . . . . it must be taken that the statute prohibits the company from proceeding to an allotment of shares and that any allotment of shares would accordingly be illegal."

Swinfen Eady L.J. said (3): "It was next said that as the statute does not contain any penalty in terms for the company allotting in breach of s. 82, such an allotment could not be considered invalid; that there were no provisions in the statute to render the allotment invalid as there had been in previous statutes. It may or may not have been a casus omissus; it may be that in the consolidating statute the point was lost sight of; but in my judgment the effect of this statutory provision that a company shall not do a certain thing—that is in this particular case shall not enter into a contract, because the allotment following the application constitutes a contract to take the shares—this prohibition that the company shall not enter into the contract completely prohibits and prevents the company from legally entering into a contract . . . . Therefore, with regard to the second point . . . . that there was nothing in the statute to render the allotment invalid, I am of opinion that if no statement had been filed the allotment would have been invalid."

(1) [1914] 1 Ch. 390. (2) [1914] 1 Ch. 399.
(3) [1914] 1 Ch. 408.

Phillimore L.J. said (1): "I accept the argument of the appellants that the effect of s. 82 is to make an allotment of shares or debentures by a company which is not a private company, and which does not issue a prospectus and does not file a statement in lieu of prospectus, not voidable but void."

Relying on these passages the respondents say that the liquidator in right of the company cannot assert, contrary to the statute, that the shares and debentures were ever issued at all, and that, therefore, the respondents could not have received at the expense of the company by way of profits something that by law never had any existence. I do not propose to express an opinion on the question whether the views expressed by the learned judges above referred to are right or not, as it is not necessary for my decision in this case, and I do not therefore think it would be respectful for me to do so. But, having regard to s. 1, sub-ss. 1 and 5, of the Companies Act, 1907, read with s. 5 of the Companies Act, 1900, and s. 87 of the Act of 1908, there may be, I think, on a proper occasion and in a Court entitled to discuss the matter, much to be said in favour of the view that the provisions of s. 82 are directory only and intended to apply only to the period before a statement in lieu is in fact filed. Further, it is a canon of construction that a statute, and especially a consolidating statute, shall not be construed so as to impair, more than necessary, obligations previously entered into by the person or company enjoined. This section seeks apparently only to aid a certain class, that is, shareholders and debenture holders. As to these points see *Lodge* v. *National Union Investment Co.* (2), per Parker J.; and *In re Suarez* (3), per Scrutton L.J. Again the rights of those members of the class who purchased the shares and debentures in question for value, and without notice, from these guilty vendors, may be entitled to consideration on other grounds. For instance, nothing was said in *In re Blair Open Hearth*

(1) [1914] 1 Ch. 412.
(2) [1907] 1 Ch. 300, 306.
(3) [1918] 1 Ch. 176, 199, 200.

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Furnace Co. (1) as to the applicability or otherwise of the doctrine of estoppel. Now *Webb* v. *Herne Bay Commissioners* (2), and many other cases, decide that persons may be estopped from denying the validity of documents the execution of which is prohibited by statute, and, without questioning the correctness of the above dicta, I see no reason for allowing Lewis and Demery to set up the illegality or invalidity, if it exists, of the shares and debentures which they promoted the company to issue, and the issue of which they obtained, without providing the company with an independent board of directors, and which shares and debentures they realized and turned into money in accordance with their original scheme. But, further, and assuming the shares and debentures to have been illegally issued, the liquidator is not relying on their validity or seeking to contend anything contrary to the statute. What he says, and I think says consistently with good sense and good law, is this: "You, the promoters, caused these documents, invalid and worthless though they may be, to be issued in fraud of the company and by way of breach of trust and obtained possession of them in breach of duty, having no right or title to them as against the company; you, as trustees, have realized large profits by dealing with what did not belong to you and which, but for your position as trustees, you would never have been in a position to obtain, and you must account to your cestui que trust for the profit so made."

Let me take an analogous case. Suppose a testator dies possessed of worthless and invalid certificates for shares, leaving two trustees who surreptitiously obtain possession of the certificates and by fraud or otherwise realize them for cash and put the money in their pockets, without informing their cestui que trust either of the existence of the certificates or of their realization. Would they be entitled to retain the proceeds unrecovered from them by their defrauded purchasers on the ground that the certificates were invalid and worthless if honestly dealt with? In my judgment they would not.

(1) [1914] 1 Ch. 390. (2) L. R. 5 Q. B. 642.

Reverting for a moment to the original scheme of December 4 and 5, there is this further to be said: There was no genuine purchase by Lewis of the mill at all, except as part of the machinery for the main purpose of the scheme, which was the promotion of this company and the obtaining of the shares and debentures in question for the purpose of realization and profit making, and the fact that it was part of the arrangement that he should subsequently be put in possession of ample funds to see the business through if he would temporarily advance the cash purchase price for the property, throws a further and significant light on the truth of the story told by him in chief. He deliberately based his case on his having genuinely purchased the mill for himself and on the promotion of the company being bona fide undertaken for the purchase from him of his own property so acquired, in the belief that it was immaterial into how many shares the property was divided, and he swore that his intention was that he, Fletcher and Demery, should be the only shareholders, and that he never knew anything about the company actually registered, as he had previously parted with all his interest and was no longer concerned. This story was a false one, and confirms me in believing that no reliance can be placed on the evidence that he has given in this case. Demery not only knew all that Lewis knew and was a party to this scandalous promotion, but as a director caused the fraudulent contract of January 6 to be executed and was one of the accomplices of Hooley throughout the whole or the greater part of the proceedings, and a party to what, in my judgment, was a conspiracy to defraud the public by the large sales of shares in the circumstances that I have detailed, and I do not accept or believe any of his evidence that is contrary to the conclusions at which I have arrived.

As to the deception of the company, I have already dealt with the absence of evidence of any knowledge of and assent to what was done on the part of Fletcher's son and some of the signatories, and I will only add that as regards the latter, they were members of the company as from the date of its registration, and entitled to be entered as members on

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its register under s. 24, sub-s. 1, of the Act of 1908, quite independently of any question under s. 82.

As to the position of Lewis and Demery I desire to refer to only one further authority. In *Gluckstein* v. *Barnes* (1) the headnote is as follows: "A syndicate was formed to raise a fund, buy a property and resell it to a company or some other purchaser; the fund to be in the names of trustees who were to promote and register a company to which they should resell the property, and who if a company should be formed were to be directors. The trustees bought up some of the charges upon the property for sums below the amount which the charges afterwards realized, and thereby made a profit for the syndicate of 20,000*l.* They bought the property for 140,000*l.*, formed a limited company and resold the property for 180,000*l.* to the company, of which they were the first and at that time the only directors. They issued a prospectus inviting applications for shares and disclosing the two prices of 140,000*l.* and 180,000*l.* but not the profit of 20,000*l.* That some profit had been made by buying up the charges might have been discovered by a close examination of a contract which was referred to in the company's memorandum and articles of association and in the prospectus. Shares were issued and the company afterwards went into liquidation:— Held, that the trustees ought to have disclosed to the company the profit of 20,000*l.*; that they had not disclosed it; that the fact that the company could not now rescind was no bar to relief; and that the appellant as one of the trustees was bound to replace that portion of the 20,000*l.* which had been paid to the trustees as their share."

Lord Halsbury said (2): "I am wholly unable to understand any claim that these directors, vendors, syndicate, associates, have to retain this money. I entirely agree with the Master of the Rolls that the essence of this scheme was to form a company. It was essential that this should be done, and that they should be directors of it, who would purchase. The company should have been informed of what was being done and consulted whether they would have allowed this

(1) [1900] A. C. 240. (2) Ibid. 246.

profit. I think the Master of the Rolls is absolutely right in saying that the duty to disclose is imposed by the plainest dictates of common honesty as well as by well-settled principles of common law."

Later on he said (1): "Then it is said there is the alternative suggested upon the agreement that the syndicate might sell to a company or to some other purchaser. In the first place, I do not believe they ever intended to sell to anybody else than a company. An individual purchaser might ask inconvenient questions, and if they or any one of them had stated as an inducement to an individual purchaser that 140,000*l.* was given for the property, when in fact 20,000*l.* less had been given, it is a great error to suppose that the law is not strong enough to reach such a statement; but as I say, I do not believe it was ever intended to get an individual purchaser, even if such an intention would have had any operation. When they did afterwards sell to a company, they took very good care there should be no one who could ask questions. They were to be sellers to themselves as buyers, and it was a necessary provision to the plan that they were to be both sellers and buyers, and as buyers to get the money to pay for the purchase from the pockets of deluded shareholders. My Lords, I decline to discuss the question of disclosure to the company. It is too absurd to suggest that a disclosure to the parties to this transaction is a disclosure to the company of which these directors were the proper guardians and trustees. They were there by the terms of the agreement to do the work of the syndicate, that is to say, to cheat the shareholders; and this, forsooth, is to be treated as a disclosure to the company, when they were really there to hoodwink the shareholders, and so far from protecting them, were to obtain from them the money, the produce of their nefarious plans."

Lord Macnaghten said (2): "These gentlemen set about forming a company to pay them a handsome sum for taking off their hands a property which they had contracted to buy with that end in view. They bring the company into

(1) [1900] A. C. 247. (2) [1900] A. C. 248.

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existence by means of the usual machinery. They appoint themselves sole guardians and protectors of this creature of theirs, half-fledged and just struggling into life, bound hand and foot while yet unborn by contracts tending to their private advantage, and so fashioned by its makers that it could only act by their hands and only see through their eyes."

In my judgment, Lewis as a promoter of this company, and Demery as a promoter and director, are liable to account for and pay to the liquidator all moneys severally received and retained by them by means of the realization of the shares and debentures forming the secret profit above explained, subject to any disbursements made by them respectively in obtaining the same.

With regard to the second summons, in so far as it seeks to make the directors, Demery, Fletcher and Macdonald, liable for damages qua the secret profit, I have already dealt with Demery. As to Fletcher and Macdonald, they can only be sued in damages, as no part of the secret profit in question was received by either. The company, for the reasons that I have above referred to, suffered no damage as such qua the issue of the 95,000 shares in question, and the value of the debentures will be brought into account as against Lewis, who obtained them. But both of these directors acted with gross negligence and were guilty of serious breaches of trust, to say the least of it, in connection with this matter; and although I cannot order them to pay damages on this part of the summons, their conduct must be regarded on the question of costs.

[After dealing with a subsidiary point as to an alleged wrongful payment of a dividend by the directors, his Lordship returned to the main question of the secret profits. He found as above stated that Lewis had received in cash or in property accepted by him in lieu of cash a total amount of 66,390*l.* against his 31,000*l.* outlay, making a profit of 35,390*l.* He also found that Demery had sold his shares before March 10, 1920. His receipts were not yet proved, but his outlay was 826*l.* 11*s.*, which he was entitled to set off. His Lordship then made the following order:]

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1. A declaration on the first summons that the shares and debentures in question were received by Lewis and Demery by way of secret profit and in fraud of the company, and that Lewis as a promoter, and Demery as a promoter and director, are liable to account for and pay to the liquidator the amount of all moneys or money's worth severally received by them respectively by means of the realization and sale of the same, subject to all disbursements, if any, properly made by them respectively in obtaining and realizing such shares and debentures.

2. Judgment against Lewis for 35,390*l.*

3. An account of all moneys or money's worth received by Demery on the sale or realization of the 20,000 shares received by him as aforesaid, and an order that he do pay to the liquidator the amount, if any, found due from him on the taking of this account after crediting him with the sum of 826*l.* 11*s.* The costs of taking this account to be reserved.

4. An order that Lewis and Demery do jointly and severally pay to the liquidator his costs of the first summons down to and including the date of this order.

5. No order on the second summons against the directors, except that they do pay their own costs thereof respectively.

6. The liquidator's costs of both summonses, except so far as the same are obtained by him under this order, to be his costs in the liquidation.

7. One order on the two summonses.

His Lordship then directed that all the documents in the case should be impounded.

Solicitors: *Cohn, Seligman & Bax; Grundy, Kershaw, Samson & Co.; C. R. Enever; Monro, Saw & Co., for A. J. Cash, Derby; Dod, Longstaffe & Fenwick, for Isherwood & Hose, Heywood.*

G. R. A.

C. A.
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[1915. M. 613.]

Revenue—Mortgage—Compound Interest with Annual Rests—Capitalisation—"Interest of money"—Income Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., r.* 1 (*a*); *General Rules applicable to all Schedules, r.* 19 (1.).

By deed dated June 6, 1898, some of the then next of kin of a lunatic for valuable consideration conveyed by way of mortgage their expectancies in the estate of the lunatic to an insurance society subject to redemption on payment to the society of 40,000*l.* at any time after the death of the lunatic with compound interest thereon at the rate of 4½ per cent. per annum with annual rests; and the deed provided that nothing therein contained should render the mortgagors or any of them personally liable for the principal and interest thereby secured, but the same should be exclusively charged upon and payable out of the mortgaged premises.

On the death of the lunatic her estate was administered by the Court and by the order on further consideration the 40,000*l.* was paid to the Society out of funds in Court and sufficient funds were carried over to a separate account to answer the compound interest payable under the deed subject to income tax (if any). The society claimed payment of the compound interest without deduction of income tax on the ground that it had been capitalised:—

Held, that the compound interest had not been capitalised, and was "interest of money" within r. 1 (*a*) of Case III. in Sch. D to the Income Tax Act, 1918, and that the mortgagors under r. 19 (1.) of the General Rules applicable to all the Schedules to the Act were entitled on payment of the interest by way of deduction for income tax to so much of the funds carried over to the separate account as was equal to the income tax in each yearly instalment of interest as and when it became due.

In re Craven's Mortgage [1907] 2 Ch. 448 approved and followed.

Decision of P. O. Lawrence J. [1921] 1 Ch. 172 affirmed.

Appeal from a decision of P. O. Lawrence J. (1)

On January 24, 1915, Ellen A. Morris died, a spinster and intestate, and possessed of very considerable property. For many years before her death the intestate was a lunatic and her presumptive next of kin from time to time heavily mortgaged their expectancies in her estate to various

(1) [1921] 1 Ch. 172.

insurance and reversionary interest societies. Two of such mortgages were given to the Norwich Union Life Insurance Society (hereafter called the Norwich Union). By the first mortgage, dated June 6, 1898, the mortgagors in consideration of 20,000*l.* paid to them by the Norwich Union conveyed as beneficial owners their respective shares and interests in the real and personal estate of the lunatic to the Norwich Union subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of the sum of 40,000*l.* with compound interest at the rate of 4½ per cent. per annum from the day of the death of the lunatic with yearly rests. By the second mortgage, dated June 4, 1902, the mortgagors in consideration of 10,000*l.* paid to them by the Norwich Union conveyed as beneficial owners their respective shares and interests in the real and personal estate of the lunatic to the Norwich Union subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of the sum of 21,500*l.* with compound interest for the same at the rate of 4½ per cent. per annum from the day of the death of the lunatic with yearly rests. Both deeds provided that nothing therein contained should render the mortgagors or any of them personally liable for the principal sum and interest thereby secured but the same should be exclusively charged upon and payable out of the mortgaged premises.

Soon after the death of the lunatic this action was commenced to administer her estate and by the judgment, dated May 17, 1915, the usual accounts and inquiries in such cases were (inter alia) directed; and by the order on further consideration, dated October 9, 1919, the principal sums of 40,000*l.* and 21,500*l.* were paid to the Norwich Union out of funds in Court, and certain other funds sufficient to answer the compound interest were carried over to a separate account entitled "The account of the Norwich Union Life Insurance and their mortgagors subject to income tax (if any)." The compound interest calculated with yearly rests from the death of the lunatic down to January 24, 1920, on the two mortgages amounted to 9580*l.* 19*s.* 3*d.* and

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5149*l.* 15*s.* 4*d.* respectively, and the Norwich Union, on April 6, 1920, issued a summons asking in substance for a declaration that the mortgagors were not under the mortgages of June 6, 1898, and June 4, 1902, entitled by way of deduction for income tax to any part of the funds so carried over, and for payment out to the applicants of such funds without deduction on account of income tax except in respect of tax payable on the dividends accrued on the funds since they were carried over.

Two other insurance offices and two reversionary interest societies who also held from some of the next of kin mortgages on their expectancies in the lunatic's estate with similar provisions for compound interest also issued summonses for payment to themselves out of the funds in Court of the amounts due to them respectively for compound interest. The five summonses were heard together.

P. O. Lawrence J. held that the cases were covered by the decision in *In re Craven's Mortgage.* (1) He accordingly dismissed the summonses, holding that the mortgagees were entitled to deduct income tax from the annual payments of interest on the mortgages.

The various mortgagee societies appealed. The appeals were heard on October 20, 24, 1921.

On the hearing of the appeals the mortgagee societies all appeared by the same counsel. The argument on appeal was confined to the mortgage of June 6, 1898, to the Norwich Union Insurance Society, it being admitted that the mortgages were all in the same form and that the same considerations therefore applied to them all.

Jenkins K.C. and *J. W. F. Beaumont* for the appellants. The questions in this case are (1.) whether it is competent to a mortgagor and mortgagee to enter into an agreement for capitalising the interest payable on the mortgage so that the interest shall cease to be "interest of money" within the Income Tax Act, 1918, and (2.) whether the mortgagors and mortgagees have done so in this case. There is nothing

(1) [1907] 2 Ch. 448.

illegal in a bargain that if interest is not paid at the end of a year it shall be converted into principal: *Clarkson* v. *Henderson*. (1) A provision for the payment of compound interest with yearly rests is equivalent to a provision that the interest shall be capitalised. That is the effect of the mortgage in this case. From early days that sort of bargain has been treated as effecting the capitalisation of interest: Coote on Mortgages, 8th ed., vol. i., p. 139; vol. ii., p. 1188; *Chambers* v. *Goldwin* (2); *Rufford* v. *Bishop*. (3) The form of words used is not material. It must be admitted that *In re Craven's Mortgage* (4) is difficult to distinguish in principle from the present case, but the bargain there was a different one and did not deal in terms with compound interest. The point now before the Court did not arise for decision, and it is submitted that the observations of Warrington J. in that case so far as they purport to lay down any principle were dicta only, and are not binding on this Court.

Where compound interest is reserved by the mortgage, if it is not in fact or notionally paid at the end of the year it becomes capital and is added to mortgage debt. The fact that, as in this case, the mortgagor is not personally liable to pay the interest is immaterial. Compound interest is equivalent to a stipulated sum ascertained in terms of interest to be added to the principal debt. There is not a notional payment of money. For convenience of taxation the Revenue authorities assess the payer of the interest. The question of the deduction of income tax cannot arise until the period for payment of the interest arrives. If there is then no payment that period does not arrive and it is therefore competent for the mortgagor and mortgagee at that time to agree that a sum equal to the gross amount of the interest then payable shall be added to the principal debt. As long as the interest is unpaid the parties are at liberty to vary the bargain. The substance of the bargain must be looked at, and was the same as if it had been stated in express terms that the interest

(1) (1880) 14 Ch. D. 348.
(2) (1804) 9 Ves. 254, 271.
(3) (1829) 5 Russ. 346, 353.
(4) [1907] 2 Ch. 448.

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should be capitalised. The words of the deed are sufficient to carry out what, it is submitted, was the intention of the parties—namely, that the interest should be capitalised.

[They also referred to *Hopkinson* v. *Rolt.* (1)]

Hildyard K.C., *A. M. Latter* and *Cyril L. King* for the various mortgagors and *Wilfrid Hunt* for the executors of a deceased mortgagor were not called upon.

LORD STERNDALE M.R. This is a very important case, I quite agree, because it arises upon what I am told is a common form mortgage of a reversionary interest. It is a matter which, with income tax at the present rate, involves large sums of money; and as the judgment which I am about to give is against wealthy and powerful insurance companies, I have no doubt if I am wrong I shall be put right.

The matter arises upon a mortgage to the Norwich Union Insurance Company of a reversion falling in upon the death of a lady who was a lunatic. The mortgage may be shortly stated in these terms—that in consideration of 20,000*l.* paid to the mortgagors by the mortgagees, the mortgagors as beneficial owners conveyed their interests in the real and personal estate of the lunatic to the mortgagees, subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the Norwich Union of the sum of 40,000*l.*, with compound interest on the same at the rate of $4\frac{1}{2}$ per cent. per annum from the day of the death of the lunatic, with yearly rests. In consideration therefore of an advance of 20,000*l.* the mortgagors were to pay 40,000*l.* on the death of the lunatic, and if that 40,000*l.* was not then paid compound interest at the rate of $4\frac{1}{2}$ per cent. with yearly rests was to be paid from that date. I do not think that the words "yearly rests" really add anything to the matter, because their effect is merely to define the periods at which the interest is to become payable upon what I will call for the moment—I do not wish to beg the question—the overdue interest. The rests might have been half yearly or two yearly, and the result would have been just the same.

(1) (1861) 9 H. L. C. 514.

The question to be decided is this. On payment off of the mortgage the mortgagors seek to deduct income tax upon the amount of the interest from the date of the death of the lunatic, whereas it is contended by the mortgagees that that amount cannot be deducted, but that all that can be deducted is the tax upon the interest for the last year, if that were paid in the last year, because it is contended that the meaning of the words "compound interest" is that at the end of each year, when the rest is taken, any interest which is overdue at that time at once becomes capital for all purposes, and therefore when it is paid to the mortgagees it is a repayment of capital, and not a payment of interest.

The question is whether an amount which is equal to a number of years' interest until then unpaid, is "interest of money, whether yearly, or otherwise, or any annuity, or other annual payment," within the meaning of the Income Tax Act, 1918, Sch. D, Case III., r. 1 (*a*). If it be, then income tax is payable upon it, and if the income tax is payable upon it, the mortgagors, when the money comes to be paid over, would be entitled to deduct this tax.

To my mind, the question is a short one, and my answer to it, whether right or wrong, can be very shortly stated. In my opinion the words "compound interest" are not so comprehensive, and do not mean so much as the appellants contend. The agreement that the mortgagors make—and I am satisfied that it would probably be the only one that they ever thought they were making—is that if they do not pay their interest as it should be paid, after the death of the lunatic, at its due date, then they will have to pay interest upon that interest as well as interest upon the capital which is unpaid. The way in which that is generally done in keeping accounts is that at the end of the first and every succeeding year the interest for the year which is unpaid is added to the capital; at the end of the second year the interest for that year, if it is unpaid, together with interest on the first year's unpaid interest, is added to the sum made up of the capital and the first year's interest; and upon those aggregate sums interest is calculated for the

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following year, and so on. That is the way in which, in practice, the matter is dealt with. The process would be more complicated but would, as it seems to me, effect the same result, if the interest were not added to the capital, but two accounts were kept, one charging interest upon capital year by year, and the other charging interest upon the sums of overdue interest which are not paid from year to year. That however is not the way in which it is done in practice. It would be a cumbrous and unbusinesslike way of doing it. The way in which it is done as a matter of business is by adding the interest year by year—namely, the interest for the first year to the capital sum, the interest for the second year to the capital sum, plus the first year's interest. This is commonly and conveniently spoken of as capitalising the interest. It is capitalising the interest in a sense, and in the sense in which Mr. Beaumont put the matter to us. He said that the interest should be treated as capital for the purpose of bearing interest; and in the sense that it becomes a thing which bears interest itself, which interest, as a rule, does not, it may be said to be capitalised—that is to say, it may be said to be put in the same position as capital in the sense that it is regarded as a thing which bears interest. But it seems to me that it is going a very long way beyond that to say that it is made capital for all purposes, and that when it is paid, at the expiration of three, four, five or ten years, it is all paid, with the exception of the last year, as capital. I do not think that the words "compound interest with yearly rests" at all necessarily show, or indeed do show, that the mortgagors intended that any unpaid interest should become capital for all purposes, the result no doubt, if it were so, being that they would pay more than they would if it were to be considered as interest, because if they had paid their interest at the end of the first year they would have paid it less tax. That is admitted. If it is to become capital for all purposes, then they have to pay that as part of the capital, without any deduction of tax at all. I do not believe that such a matter was ever in contemplation, and in my opinion that is not the meaning of an agreement simply to pay compound

interest. I think that the word "capitalisation" used in many of the books quoted is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalisation for all purposes, income tax and otherwise. I do not think that is the meaning of the word. In my opinion—not to beg the question—when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged upon them, and although, as a matter of bookkeeping, they have from time to time been added to capital, they do not cease to be interest of money—that is to say, they are overdue interest upon which interest has been paid.

Therefore, I think the appeal fails and should be dismissed with costs. I may say that I do not think any distinction in principle can be drawn between this case and the case of *In re Craven's Mortgage.* (1) I agree with P. O. Lawrence J. upon that point and I think that that case was rightly decided.

WARRINGTON L.J. The question in this case is whether or not, in calculating the amount of interest payable by certain mortgagors to their mortgagees, on the redemption of the property comprised in the mortgage, it is right to deduct income tax from time to time payable in respect of that interest. It happens that the interest is described as compound interest, and it is said that because it is so described and is in fact compound interest that there is no longer any possibility of deducting income tax, except of course in respect of the interest for the final year when redemption takes place, as it did in this case, in the middle of the year.

The facts are these: One, Ellen Morris, was in the year 1898, and had for many years previously been, a lunatic. She had a number of relations who were her presumptive next of kin, that is to say, persons who, if she died, under the existing circumstances would be entitled, as statutory next of kin, to share between them her estate, which was a large one. Under

(1) [1907] 2 Ch. 448.

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those circumstances, in the year 1898 certain of those persons were desirous of raising money on their presumptive interests in Miss Morris's estate, and they succeeded in getting the Norwich Union to make them an advance. The security for that advance took this form. The actual sum advanced was 20,000*l.*, the principal sum to be paid on redemption was 40,000*l.* The proviso for redemption (omitting details) was in these terms: "If the mortgagors or some or one of them . . . . shall at any time after the death of the lunatic pay to the mortgagees or their assigns all costs charges and expenses which they may hereafter properly incur in relation to this security, and also the sum of 40,000*l.* with compound interest for the same at the rate of 4*l.* 10*s.* 0*d.* per cent. per annum from the day of the death of the lunatic with yearly rests," then the mortgagees will reassign.

The lunatic died on January 24, 1915. The time has now arrived when the money arising from Miss Morris's estate is available for redemption. The mortgagors propose that out of that money there shall be paid 40,000*l.* and compound interest, deducting each year the tax at the legal rate in force in that year, that is to say, for the first year ending January 24, 1916, there would be deducted income tax on 1800*l.*, for the next year the interest would have to be reckoned on that 1800*l.* less tax, and again what would be paid would be that amount together with the 1800*l.*, less income tax and so on. The mortgagees insist that they are entitled to have each year's interest as if it were not interest at all, but capital, added to the capital, and paid in full, without any deduction for income tax, the only interest then being subject to that deduction being the interest for the broken year at the end of the period.

Now which of those two contentions is right? Deduction of income tax from interest is provided for by r. 19 (1.) of the General Rules applicable to Schedules A, B, C, D and E of the Income Tax Act, 1918. I will read the rule shortly, leaving out so much of it as is not applicable to this case: "Where any yearly interest of money"—and certain other things specified—"is payable wholly out of profits or gains brought

into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due." Now the real question is, does the interest cease to be yearly interest of money, because at the end of the specified period denoted by the expression "yearly" or "half-yearly rests," as the case may be, the interest itself bears interest? In my opinion it does not cease to be yearly interest. All that the expression "compound interest" really means is, that if the interest, or a portion thereof, is not paid, then that interest or that portion of it which is not paid, shall itself bear interest, and so on. The mortgagees insist that the real effect of the expression "compound interest" is that the interest unpaid shall for the future for no purpose be regarded as interest, but shall thenceforth be added to the principal, as if it had itself originally been part of the principal to be paid. In my opinion that is not the result of the expressions which have been used.

It is unnecessary for us to deal with anything except the document which is before us which, as I say, contains simply the expression "compound interest with yearly rests." It is unnecessary to express any opinion as to what might be the result if, instead of the document being so worded, it had provided in express terms for the capitalisation of each year's interest—and by capitalisation I mean the complete conversion of that interest into principal. Whether such a provision would make any difference in the result, and whether, if it did, it would contravene the provisions of r. 23 of the General Rules applicable to all the Schedules which renders void every agreement for payment of interest in full

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without allowing such deduction, and would so be void or not, I express no opinion, except that I think both points are certainly open to grave consideration—namely, whether the express provision I have referred to would have any more effect than that with which we are dealing, or whether, if it had that effect, it would contravene the provisions of the Income Tax Act. I think both those questions are open to very serious consideration if and when they arise. They do not arise in this case, and I therefore express no opinion upon them.

In my opinion both *In re Craven's Mortgage* (1) and the present case were rightly decided. I think therefore this appeal should be dismissed with costs.

YOUNGER L.J. I am of the same opinion. I so far agree with the argument on behalf of the appellants as to recognize that even if these annual instalments of interest are not treated as strictly capitalised there is in a mere matter of administration little or no distinction between accounts properly kept on that footing and those which would be kept if these instalments were for all purposes capitalised. That is to say, as far as I can see, after the operation directed by this deed is complete, there remains no respect in which any one part of the aggregate fund thereupon constituted is differentiated for any purposes from any other part of it. I may illustrate what I mean by an example. In the case of a mortgagee's account, on realization by him of his security, or on receipt of an instalment on account of what is due to him, where there is an arrear of interest, all moneys received by the mortgagee are properly applied, first, in satisfaction of interest in arrear, and next in reduction of principal, the result, of course, being to increase the total amount of principal unpaid and carrying interest beyond that which would remain unpaid if the money received were applied first in payment of principal, or were applied rateably in payment of both principal and interest. But in the case of this mortgage deed, if the mortgagees had, after January 25,

(1) [1907] 2 Ch. 448.

1916, proceeded to realize their security, the amount due to them calculated to January 25, 1916, would not, so far as principal and accrued interest were concerned, be due to them, so far as I can see, in respect of two accounts, one of which was principal and the other interest, but would be due to them on one account only so that the interest first to be discharged out of the proceeds of realization would be confined to the current interest alone.

I take leave however gravely to doubt whether the operation referred to, although it produces a result not in substance distinguishable from a capitalisation of interest, is either such a capitalisation or is intended so to be. If it were such a capitalisation consequences quite unforeseen and as I should suppose unintended either by the mortgagors or the mortgagees might easily ensue. These payments, if they are held to be so capitalised, must, I conceive, be treated as if the arrangement in the deed amounted to an agreement on the part of the mortgagees to permit the sum payable to them in every year by way of interest, instead of being paid, to be charged upon the property as an addition to the original advance, or as a further advance. But if so, then on the principle of *Hopkinson* v. *Rolt* (1), the mortgagees would or might find themselves in respect of any or all of these advances postponed in point of security to some mesne incumbrance, of which before they were made they had notice. I think it may well be that this consequence, presumably neither foreseen nor intended by either of the parties to the deed, can only be avoided by treating all accumulations of interest as being additions to the sum remaining unpaid in respect, not of principal, but of interest, and therefore not in the sense now contended for capitalised at all. My own view is that this is the true result of the clause, and it is agreed, as I understand, if that be so, that the order under appeal is not open to review.

But I will assume, contrary to that opinion, that these instalments are capitalised, and also I will assume without

(1) 9 H. L. C. 514.

C. A. 1921 MORRIS, *In re.* MAYHEW *v.* HALTON. Younger L.J.

deciding it, that there is nothing in the Income Tax Acts which precludes an agreement between the parties to that effect. The question then arises, what is the sum which is so capitalised in every year? In my judgment, on the true construction of this deed, it is that sum and no more than that sum which would in respect of interest have been then payable to the mortgagees if the deed, in place of permitting it in effect to be added to the principal, had directed it to be paid to them. It would seem that on this present assumption one of two possible transactions may on analysis be said to be elliptically provided for by the provision in question. It may be said that the provision is in effect one by which the mortgagors submit to the addition in every year to the principal then secured by the mortgage of a further capital sum equal to $4\frac{1}{2}$ per cent. of that principal, or it may be said that the provision is in effect one under which the mortgagees relend to the mortgagors the interest which is treated as having been first paid to them. I cannot myself see how the appellants can even on the present assumption succeed unless they are able to establish that the first and not the second of these transactions is that which is really carried out by the provision in question. But I cannot myself doubt that the second and not the first of these operations more closely approximates to what is actually effected by the words used. This provision is not dealing with a capital sum at all. It is dealing with a sum of interest accruing from day to day as interest and bearing that character, until by being added to the principal it itself carries interest. The mortgagors under this deed could, it is agreed, in any year stop this operation from being completed by paying to the mortgagees the interest for that year. What is the sum they would so have to pay? Admittedly, the interest less tax, and I am led by this consideration to the conclusion that the real effect of such a provision as this, would on the present assumption be to add to the principal the sum only which would be added if notionally that interest had been paid and were at once relent to the mortgagors on the security. It is said that this view of the bargain is subversive of existing practice.

It may be ; I do not know. It is, however, a fair observation to make in that connection that a provision for capitalising interest is not naturally to be so construed as to charge the mortgagors with more interest than that which would be due from them if the interest were paid as it became due. That would seem a strange result, yet it and nothing less would follow from acceding to the claim here made by the appellants. They would, in that event, in fact receive in respect of interest a sum exceeding any which would be theirs under an ordinary covenant to pay in each year interest at the rate of 4½ per cent., and that addition to their receipts would result in effect from charging the mortgagors for their benefit with income tax twice over. In these days of high income tax the result to a mortgagor of acceptance of the appellants' view would be crushing. Such a result ought, I think, to be brought about only by language so clear and unambiguous as to be free from any uncertainty. The terms of the present deed are, in my judgment, quite inadequate for any such purpose.

Accordingly, in every view of the case I think that the decision of the learned judge was correct, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Collisson, Prichard & Barnes, for Ernest Hicks, Norwich ; Tucker, Lake & Lyon, for F. A. Woodcock, Manchester ; A. T. Plant, for Plant, Abbott & Plants, Preston.*

W. I. C.

SARGANT J.

1921

July 27, 28; *Oct.* 19; *Nov.* 2.

FOWLER *v.* KIBBLE.

[1920. F. 1068.]

Trade Union—Trade Dispute—Refusal to Miners of Safety-lamps—Checkweigher—Interference with Workmen—Depriving Workmen of or hindering them in use of Tools—Conspiracy, and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58), *s.* 13—*Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3.

The Conspiracy, and Protection of Property Act, 1875, s. 7, provides that "every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, —— . . . .

"3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; . . . . shall, on conviction, ... be liable either to pay a penalty, ... or to be imprisoned. . . . ."

Safety-lamps used in mines are "tools" within the meaning of the above section.

It is not a breach of the above section to deprive a person of or hinder him in the use of his tools for the purpose therein mentioned, if such deprivation or hindrance is effected without violence or threats of violence.

Where there is an existing arrangement between the recognized trade unions and the employers' association that non-unionists shall not be employed in the mines of a district, and at one of these mines officials of a recognized trade union, in pursuance of the settled policy of their union, advise or instruct a workman charged with giving out safety-lamps not to let miners who are members of an unregistered union have their lamps, or when they obtain from some of these miners the lamps issued to them without employing violence or threats of violence, their action, if taken for the purpose of preserving peace in the mine by preventing non-unionists from working there, is done in contemplation or furtherance of a trade dispute within s. 3 of the Trade Disputes Act, 1906, and does not constitute a breach of s. 7 of the Conspiracy, and Protection of Property Act, 1875.

The provision in s. 13, sub-s. 3, of the Coal Mines Regulation Act, 1887, that "a checkweigher shall not be authorised in any way . . . . to interfere . . . . with any of the workmen or with the management of the mine; . . . ." is intended solely for the protection of the management; and workmen with whom there has been such interference cannot ground a civil action upon this breach of the sub-section.

WITNESS ACTION.

The plaintiffs were ten miners who at all material times were working for the Cannock and Leacroft Colliery Co., Ld.,

at their colliery at Cannock and were members of the Wednesfield and District Miners' Association (hereafter called the Wednesfield Union). The defendant William Kibble was a checkweigher in the same mine and also the treasurer and a member of the Cannock Chase Miners' Association (hereafter called the Cannock Union). The other defendant Henry Sambrook was a stallman in the same mine and also a delegate of the Cannock Union.

The Cannock Union and another body called the Pelsall Miners' Association (hereafter called the Pelsall Union) were trade unions for miners within the Cannock Chase district and were both districts of the Miners' Federation of Great Britain and recognized and accredited trade unions. The Wednesfield Union had been formed by a man called Cartwright who had been a member of the Pelsall Union but had left the Federation. At the material time the Wednesfield Union had not been registered as a trade union under the Trade Union Acts, and although since registered had been refused affiliation to and recognition by the Federation.

The two recognized unions had adopted the settled policy of objecting to their members working with non-unionists or with members of any union not recognized by the Federation, and in 1918 an arrangement had been made between the two unions and the Cannock Chase Coal Owners' Association (being an association of the owners of all collieries in the district) that only members of the two unions should be employed at collieries in the district. That arrangement was, as Sargant J. found, still on foot.

It was customary for the officials of these unions to hold at each of the collieries of the district periodical examinations of the men's cards of membership. The object was: (1.) to insure that no person was working at the mine who was not a member of the two unions; and (2.) to insure that members of the unions were not in arrears with their subscriptions.

The following further material facts were found by Sargant J. On June 4, 1920, a resolution was passed by the Cannock Union to hold a card examination at the mine

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in question. On June 5, 1920, the defendant Kibble warned the plaintiff Davies that unless he joined the Cannock Union he would not get work. On June 11, 1920, the defendant Sambrook saw the card of the plaintiff Fisher showing that he belonged to the Wednesfield Union and told him that he would not get his safety-lamp to enable him to go down the pit unless he joined the Cannock Union. On June 16 the lampman whose work it was to issue the lamps refused to give the plaintiff Fowler his lamp on the defendant Kibble's advice or instructions. The defendant Sambrook saw this plaintiff afterwards and told him he would not be given a lamp unless he joined the Cannock Union. On the same day the plaintiffs Davies and Birch were standing in the lamp queue when the defendant Kibble told or advised the lampman not to give them their lamps. The lampman accordingly refused to do so. On June 17 the plaintiffs Davies and Birch were at first refused their lamps, but afterwards given unnumbered lamps. A little later the defendants saw them waiting in a queue for the cage to take them down into the pit. The defendant Kibble then asked them to give up the lamps and these plaintiffs recognized the position and gave up their lamps. The request for the lamps was made calmly and without any threat or use of violence. On June 22, the first day of the card examination, the plaintiffs Turner and Humphries were waiting in the lamp queue when the defendant Sambrook told them that they were not entitled to have their lamps. They then fell out of the queue and did not pursue the matter further. On June 23, the last day of the card examination, the plaintiff Turner and five others, who were the other plaintiffs, went to get their lamps. The defendant Sambrook told them they could not have lamps as they were not members of the Cannock Union. Thereupon the men left the lamp queue. The plaintiff Samuel Turner then asked Mr. Biddle, the assistant manager of the mine, whether he insisted on the lamps being stopped. Mr. Biddle replied that it had nothing to do with him, but that he was not going to have the pit held up for half a dozen men.

The result was that those who still refused to join the Cannock Union were deprived of their employment.

The plaintiffs alleged that the defendants had in this manner interfered with the plaintiffs as workmen in the colliery and deprived them or hindered them in the use of their safety-lamps, without which it would, under ss. 32, 33 and 34 of the Coal Mines Act, 1911, be unlawful for them to carry on their employment as miners in the colliery.

The plaintiffs therefore claimed an injunction restraining the defendants from procuring or attempting to procure a breach of contract between the plaintiffs and the Cannock and Leacroft Colliery Co., Ld., and/or from interfering or attempting to interfere with the right of the plaintiffs to dispose of their labour as they would with the colliery company or otherwise; and damages.

In addition to the facts already stated, the plaintiffs relied against the defendant Kibble on s. 13 of the Coal Mines Regulation Act, 1887, as prohibiting any interference by a checkweigher with any worker at a mine; and against both defendants on s. 7 of the Conspiracy, and Protection of Property Act, 1875, by which any person who, with a view to compelling any other person to do any act which he has a legal right to abstain from doing, wrongfully deprives him of or hinders him in the use of any tools is liable to a penalty not exceeding 20*l.* or to be imprisoned for a term not exceeding three months with or without hard labour.

By their defence the defendants alleged (1.) that it was the practice when an employee was found on a card examination not to be a member of one of the two accredited unions for the union official to stop him and inform him that he could not work in the colliery until he joined one of these unions, and that by this means general stoppages were avoided; (2.) that in accordance with this practice and acting on the instructions of the Cannock Union they warned the plaintiffs that they could not work at the colliery unless they joined one of the two unions, advised the lampman, who was an employee of the colliery company, not to give them lamps, and asked those plaintiffs who had received lamps to give

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them up; (3.) that they did not use any violence or force or threats in doing this and would not have done so even if the plaintiffs had not accepted the position and left the colliery. But if the plaintiffs had insisted on obtaining or retaining their lamps and descended the pit all the other men, as the plaintiffs knew, would have ceased work and there would have been a general stoppage; and (4.) that all the defendants did was in fact, and as the plaintiffs well knew, done merely to carry out the accepted rule and practice, and in the interests of peace and good order at the colliery, and to avoid a general stoppage.

And the defendants said that in any event all the acts complained of were done in contemplation and furtherance of a trade dispute within the meaning of the Trade Disputes Act, 1906.

The further result of the evidence given at the hearing appears from the judgment.

R. A. Willes for the plaintiffs. It is admitted that if the actions of the defendants were attributable to a dispute between the Wednesfield Union and the two accredited unions, they were done in contemplation or furtherance of a Trade Dispute within s. 3 of the Trade Disputes Act, 1906. It is contended however that the defendants acted from a personal grudge against Cartwright, the originator of the Wednesfield Union.

But even if they acted in contemplation or furtherance of a trade dispute they are not protected by the section because they have committed criminal or quasi-criminal acts.

The defendant Kibble as a checkweigher acted in breach of s. 13, sub-s. 3, of the Coal Mines Regulation Act, 1887, by interfering with workers in the mine, and as this breach has resulted in injury to the plaintiffs they are entitled to an injunction to prevent any further breach and to damages. It is no answer that this defendant acted not as a checkweigher but as an official of the Cannock Union: *Sykes* v. *Barraclough*. (1)

(1) [1904] 2 K. B. 675, 679.

Again both defendants have acted contrary to s. 7 of the Conspiracy, and Protection of Property Act, 1875, in depriving the plaintiffs of or hindering them in the use of their lamps in order to compel them to join the Cannock Union. They thereby committed a criminal offence, and on this ground the plaintiffs are entitled as against both defendants to an injunction and damages.

A. Grant K.C. and *W. M. Hunt* for the defendants. The defendants acted throughout in furtherance of an existing trade dispute within s. 3 of the Trade Disputes Act, 1906. They acted throughout on the instructions of their union and in pursuance of the settled policy of their union. The plaintiffs' action therefore fails apart from the special Acts relied upon by them.

Again the plaintiffs cannot succeed against the defendant Kibble on the ground that as a checkweigher his interference was prohibited by s. 13, sub-s. 3, of the Coal Mines Regulation Act, 1887. This sub-section is inserted for the protection of the management only, and the remedy as appears in sub-s. 4 is for the employers to apply to a Court of summary jurisdiction for his removal. It is not open to the plaintiffs as miners to rely on the section and it would be to extend the meaning of the section unduly if a checkweigher who interfered with the miners was treated as guilty of criminal conduct.

The plaintiffs claim further to succeed by virtue of s. 7 of the Conspiracy, and Protection of Property Act, 1875, and say that the defendants deprived them of or hindered them in the use of their tools. The lamps refused to or recovered from the plaintiffs were not "tools" within the meaning of the section. But in any case the defendants did not act in the manner complained of in order to compel the plaintiffs to join the Cannock Union, but with a view to preventing a stoppage of work in the mine. The section is therefore inapplicable. But even if the defendants had committed a breach of the section, they would be protected in this action by s. 3 of the Trade Disputes Act, 1906: compare *White* v. *Riley* (1), where the decision of Peterson J.

(1) [1921] 1 Ch. 1.

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in *Hodges* v. *Webb* (1) was preferred to that of Astbury J. in *Valentine* v. *Hyde*. (2)

R. A. Willes in reply. The effect of s. 3 of the Trade Disputes Act, 1906, is not so far-reaching as has been suggested. It provides that an act done "in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference . . . . with the right of some other person to dispose of . . . . his labour as he wills." The word "only" is vital and shows how unfounded is the suggestion that a crime can be committed in furtherance of a trade dispute with immunity as regards civil proceedings.

To commit a breach of s. 13, sub-s. 3, of the Coal Mines Regulation Act, 1887, does not, it is true, amount to criminal conduct; but a breach of a statutory prohibition which causes injury to a particular person will give rise to an action for damages.

The position under s. 7 of the Act of 1875 is even stronger, and it affects not only the defendant Kibble but both defendants. By committing a breach of it the defendants have been guilty of a crime. There is no justification for the argument that safety-lamps essential to enable miners to work are not "tools" within the section. Further the fair inference from the evidence is that the defendants acted in the manner complained of in order to compel the plaintiffs to join their union. That was certainly one of their actions and probably the dominant one. It follows that the section applies. The advice to the lampman not to give the plaintiffs their lamps had the force of an order coming from the defendants and they deprived the plaintiffs of their lamps just as much as if they had themselves refused the lamps.

Cur. adv. vult.

Nov. 2. SARGANT J. [after stating the position of the rival trade unions:] It is quite clear that there was as

(1) [1920] 2 Ch. 70. (2) [1919] 2 Ch. 129.

between the Wednesfield Union and the Cannock Union a trade dispute in existence. Mr. Willes very fairly on behalf of the plaintiffs admitted that there was evidence on which I could find, if I were a jury, that there was such a trade dispute, and having considered the evidence carefully I have come to the conclusion that not only was there evidence on which I could find that fact, but evidence which drives me to the conclusion that there was a definite dispute between the unions. Mr. Cartwright and the Wednesfield Union had caused or persuaded a considerable number of miners in the district to become members of the Wednesfield Union instead of the Cannock Union, and there was a good deal of dissatisfaction amongst the miners who by virtue of their membership of the Cannock Union or Pelsall Union were members of the Miners' Federation of Great Britain; and, in my judgment, there was every probability of a strike in the district, or, rather, of what was called "going on play," which is not quite the same thing. This would have disorganized and stopped the work, and it was important therefore that that state of things should be rectified to the satisfaction of the miners who were members of the Federation. For a long time past in this district the recognized miners' unions had secured the monopoly of working in the district, and during that time strikes arising out of disputes between union and non-union men had been almost unknown. Moreover during the war an arrangement had been come to between the masters' Association and the Federation, which was still continuing, under which the masters had arranged only to employ the labour of miners who were affiliated to and belonged to the Miners' Federation. I am convinced on the evidence that this was a practical working arrangement at the material time; and I am satisfied that any continued breach of that arrangement was a source of great peril to the continued harmonious working of the pits. Of course, I am not expressing any opinion whatever as to whether that was a beneficial state of things or not: I am merely stating the facts as they were proved at the hearing. [His Lordship

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then referred to the resolution of June 4, 1920, for a card examination and continued :] I gather from the evidence that the plaintiffs and probably other miners who joined the Wednesfield Union were relying on the fact that the Wednesfield Union was called a union, and were asserting that they were unionists and not non-unionists. If however the mere adoption of the name of "Union" by any body of persons, or even the registration of the body of persons as a trade union would suffice, the objects of the Miners' Federation would be easily and readily defeated. Mr. Willes for the plaintiffs quite properly laid no stress upon the mere name of the Wednesfield Union and agreed that the matter ought to be treated as if the plaintiffs were persons not belonging to any union at all who were asserting their individual right to work. But I think that the existence of the Wednesfield Union and the claim which has obviously been made that the members of that union were unionists, and, therefore, at liberty to work together with the members of the Federation, were important elements in considering whether there was a trade dispute or not; and they are facts that lead me to the conclusion that there was a trade dispute. If there was, as I think there was, an arrangement between the masters and the Federation under which only union labour was to be employed, it would be dangerous for the Federation if that arrangement were to be interpreted as meaning that members of any body calling itself a union might be employed.

The card examination which was resolved upon on June 4 was to take place on June 22 and 23, and it was no doubt in view of that examination and in the course of it that the facts which are complained of in the action and which were proved at the trial took place. I will briefly summarize them as appearing from the evidence, but before doing so I must point out that no one could work underground in this mine without having a lamp, so that the possession of a lamp was an absolutely necessary condition of a miner being allowed to descend the pit in the cage or being employed in the mine at all. I think it is necessary to state that to

show what was meant by a man failing to obtain a lamp. [His Lordship then stated the facts as to the refusal of lamps to the plaintiffs.] The question is, what are the legal rights arising out of that state of things? I ought to mention that neither Kibble nor Sambrook had any control at all over the man charged with giving out the lamps or any right to order him not to give out the lamps. He was a servant of the management and could only act on the command of the management. There is only evidence of a statement or a recommendation made to the lampman by Kibble, but it may be that Sambrook made some similar statement. In my judgment what Kibble and Sambrook did, stripped of all technicalities, was to point out to the lampman that the persons in question were not entitled to work underground as not being members of the Federation. They had no power to command, and I do not think they purported to give commands. I think they pointed out to the lampman, who, of course, knew of the general arrangement between the masters and the men under which only Federation men were to work in the mine, that the persons in question were not members of the Federation, and, consequently, were not persons entitled to get their lamps or to work underground having regard to the subsisting arrangements between the Association and the Federation. Neither of the defendants had any status empowering them to do more than this, and I do not think that what was said or what was implied amounted to more than that. I should add that on one or two occasions an appeal was made by the plaintiffs or some of them to the under-manager of the mine and he declined to interfere. He took the view and expressed it that the matter was one for the men themselves and not for him; they had got to make their own arrangements, and he was not going to take part on one side or the other, and he left the men accordingly to deal with it. The manager himself, Mr. Baker, seems not to have heard of the trouble which had arisen till June 26. That was two or three days after the last of the incidents to which I have referred.

In these circumstances, have the plaintiffs any legally

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sustainable cause of action on their main ground of complaint? I am not dealing now with the two subsidiary causes of action. I think the answer must be in the negative having regard to the terms of s. 3 of the Trade Disputes Act, 1906. [His Lordship read the section.] When once I have arrived at the conclusion that there was a trade dispute that section negatives any right to an injunction restraining the defendants from procuring a breach of contract or from interfering or attempting to interfere with the right of the plaintiffs to dispose of their labour as they will. The injunction asked for practically follows the words of the section of the Act, and the section says that in the case of a trade dispute the very things it is sought to prevent shall not be actionable. Mr. Willes, who put every point that could be put for the plaintiffs, accepted this. He admitted that if I came to the conclusion that the acts complained of were done in contemplation and furtherance of a trade dispute, he could not argue that the section did not apply and that the main cause of action of the plaintiffs was not negatived. In my judgment there plainly was a trade dispute in existence at the material time and the acts in question were done in furtherance of it. Accordingly the defendants have in my judgment a complete answer to the cause of action of the plaintiffs apart from the two subsidiary causes of action to which I am now going to refer.

The first subsidiary cause of action only touches the defendant Kibble, who was a checkweigher. The statute which is relied on is s. 13 of the Coal Mines Regulation Act, 1887. That section constitutes the position of a checkweigher and creates a special code for the protection of the employers. The checkweigher is appointed by the men entirely independently of the employers, and he is there to check the weighing of the coal and see that the miners receive full value for the coal they have worked. The owners have nothing to do with him; he is appointed by the miners and he acts as a check upon the employers. The section provides a rather elaborate code under which the employers may apply to a particular authority, if they disapprove of the

conduct of the checkweigher, and get him removed. Sub-s. 3 is relied upon. It is a provision which prevents the checkweigher from interfering with the management of the mine. It is put there in order that the employers may be protected from having their management of the mine interfered with by a person who is appointed by the miners and who is there for the protection of the miners in one particular matter. He is given a position in the mine which he might, it was thought, use to the detriment of the employers with the result that the management of the mine would be interfered with. It is that which this sub-section prohibits. It is for the protection of the employers and not in the least for the protection of the miners themselves whose representative the checkweigher is. Here it is the miners who complain of something done by the checkweigher. In my judgment the miners have no locus standi under this section to complain of the conduct of the checkweigher. The section is there as a protection to the employers. Here the employers are not in any way objecting to anything done by Kibble. Indeed so far was Kibble from interfering with the management of the mine to the detriment of the employers that he was really carrying out an arrangement between the employers and the Federation under which the continuous working of the mine and the prevention of quarrels were obtained by a system intended to insure that only Federation labour should be employed in the mine. Accordingly in my judgment even if the civil right or remedy given by s. 13 was not overridden by the subsequent legislation in the Trade Disputes Act, 1906, a question which might need very careful consideration if it were necessary to decide it, there is not here any breach of duty on the part of Kibble which the miners are entitled to complain of, or indeed, as far as I can see, any breach of duty as towards the employers themselves, having regard to the arrangement that had been made between the employers' Association and the Federation.

A more serious point was raised under the Conspiracy, and Protection of Property Act, 1875. By s. 7 of that Act it is provided: "Every person who, with a view to compel any

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other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, —— . . . . 3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof, ... shall, on conviction . . . . be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned. . . . ." Mr. Willes contended that if an act is rendered criminal by statute and the doing of that act causes damage to another person, that gives rise necessarily to a civil right of action. Before considering that proposition I have, first of all, however, to see whether there was on the part of the defendants or either of them any breach of the section of the statute. It is contended on behalf of the plaintiffs that there was a breach of the section by Kibble and Sambrook because with a view to compelling the plaintiffs or some of them to do an act which they had a legal right to abstain from doing—namely, to join the Federation,—the defendants deprived them of their tools or hindered them in the use of their tools. The question was raised on behalf of the defendants whether the lamps were tools within the meaning of the section. In my judgment it is clear that a lamp without which the miner is not able to go underground or to conduct his underground operations is a tool of his trade, and any one who forcibly took away the lamp from the miner or who hindered him from the use of it, as for instance by doing something which made the lamp ineffective, would be acting contrary to the terms of that statute.

I have therefore to see whether the defendants deprived the plaintiffs of their lamps or hindered them in the use of them within the meaning of the section, and if so whether they did it with a view to compelling them to join the Federation. When I come to look through that section of the Act and consider the class of acts which is forbidden by it, it seems to me that it is directed against acts or threats of violence. If Kibble had gone up to the men and had wrenched their lamps out of their hands with

the assistance of the other union men in the vicinity, or if he had broken the lamps or destroyed the safety appliance so that the lamps could not be used underground, he would, assuming that his object was that stated in the section, clearly have committed a breach of the section. But, in my judgment, to point out to the lampmen that the plaintiffs had no right to receive their lamps under existing arrangements and that they ought not to have lamps issued to them, or to go up to the men and request them to hand their lamps back, as they were not entitled under the arrangements to go down underground and use their lamps, was not such an act as is forbidden by s. 7. It was not an act of violence nor an act accompanied by threat of violence; it was an act done for the purpose of carrying out the existing arrangements and done in a perfectly quiet, legitimate manner. I think that there was not within the meaning of the section any deprivation of these men of their lamps or any hindrance in their use of the lamps.

There is the further question whether what the defendants did was done with a view to compelling the men to join the union. I have come to the conclusion that they did not act with that intention. Kibble and Sambrook had from time to time been trying to get these men to join their union for the sake of peace. It is clear from the evidence, amongst other evidence that given by two members of the union who were not officials, that the feeling on the part of the men was the dominating consideration. As very often happens in these cases the officials were not egging the men on to violence but restraining them. The men were exceedingly indignant (whether rightly or wrongly does not matter) at a number of persons working with them who were only members of the so-called Wednesfield Union, and that feeling was liable to explode at any moment and lead the men to leave the mine and "play," as it is called, for some period, without perhaps actually striking. In my judgment it was immaterial to Kibble or Sambrook whether the plaintiffs joined the Federation or not. What they were apprehensive of was that if men who were not members of the Miners'

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Federation were allowed to descend the pit and to work in the mine there would be a cessation of work which would be to the disadvantage of every one concerned.

In my judgment the object of the defendants in telling the lampmen that the plaintiffs were not persons entitled to have lamps given to them, and their object in asking some of the plaintiffs on one occasion to give up their lamps, was not to force them to join the union but to prevent a state of things arising which would probably result in the cessation of work at the mine.

In my judgment, therefore, this other subsidiary cause of action is also ill founded, and the defendants are entitled to judgment in their favour on that point too.

Solicitors: *Ward, Bowie & Co., for H. J. Nicklin, Walsall; Sharpe, Pritchard & Co., for R. A. Willcock, Taylor & Co., Wolverhampton.*

H. C. G.

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In re TOWNLEY.

PUBLIC TRUSTEE *v.* ALLDER.

[1921. T. 1398.]

Will—Creation of Special Fund to pay Funeral and Testamentary Expenses, Debts and Duties—Insufficiency of Fund—Marshalling—In favour of Liabilities not also payable out of Residue—Construction—Payment of Liabilities rateably.

By his will a testator, after making certain specific bequests and a specific devise, directed that, "after payment thereout of all debts funeral and testamentary expenses and all death duties attracted and payable under the provisions contained in this my will," a specific fund should be divided and paid to beneficiaries as therein mentioned. He then dealt with his residuary real and personal estate by directing sale, conversion and investment in terms that were usual, except that they contained no trust for payment of debts or funeral or testamentary expenses, and after making provision for some terminable benefits settled the rest of the investments as therein and in a codicil mentioned. It had been previously decided that the death duties payable out of the special fund included the estate duties and legacy and succession duties

payable on the testator's death on the specific and pecuniary legacies, the annuities and the residue of the proceeds of real and personal estate. It appeared that the special fund was insufficient to pay in full all the liabilities made payable out of it:—

Held, that all the liabilities made payable out of the special fund ought to be paid thereout rateably, and that neither by a process of marshalling nor by virtue of the testator's intention could the liabilities payable solely out of the special fund be discharged in full thereout so as to cast on residue the payment of the remaining liabilities in as far as the balance of the special fund was insufficient to pay them.

ADJOURNED SUMMONS.

The statement of the terms of the will is taken from the judgment.

The will of the testator Albert Henry Townley, dated February 14, 1919, after certain specific bequests and a specific devise, contains the following specific gift—namely: "I direct that after payment thereout of all debts funeral and testamentary expenses and all death duties attracted and payable under the provisions contained in this my will any money I may leave or money lying in the Bank or otherwise or represented by War Stock or War Bonds may be divided and one half part thereof paid to the said William Guy Allder and the other half part thereof paid to the said Charles Lawrence and Fanny Elizabeth Lawrence as joint tenants." The testator then deals with residue by directing sale conversion and investment in terms which are quite usual, except that they do not contain any trust for payment of debts or funeral or testamentary expenses; and, after making provision for certain small terminable benefits by way of annuity or otherwise, he gives the income of the rest of the investments representing residue as to one half for the said William Guy Allder for his life and as to the other half to the said Charles Lawrence and Fanny Elizabeth Lawrence for their lives and the life of the survivor, with provision for the accruer of the income of each half in favour of the beneficiary or beneficiaries of the other half, and an ultimate gift over on the death of the survivor of the said three persons to the Gordon Hospital for Fistula.

By a codicil to his will dated October 14, 1919, the testator in effect interposes between the aforesaid gift of the residue

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of the income of his trust estate and the ultimate gift of the capital to the Gordon Hospital life interests in favour of the testator's eight named second-cousins and the survivors and survivor of them, and in other respects confirms his will.

The testator died in December, 1919, and on June 24, 1921, the Public Trustee as one of the executors and trustees of the testator's will took out this summons, asking (inter alia) whether, if such portions of the testator's estate as were included in the expression "any money I may leave or money lying in the Bank or otherwise or represented by War Stock or War Bonds" (hereinafter called the special fund) were insufficient to meet the testator's funeral and testamentary expenses and debts and "all death duties attracted and payable under the provisions contained" in the will in full, the testator's funeral and testamentary expenses and debts ought to the extent of such deficiency to be paid out of the testator's residuary estate.

Sargant J. had already decided a number of other questions as to which no report is needed, but by virtue of which the "death duties attracted and payable under the provisions contained" in the will included the estate duties and legacy and succession duties payable on the testator's death on the specific and pecuniary legacies, the annuities and the residue of the proceeds of real and personal estate. It was anticipated that as a result the special fund would be insufficient to discharge in full the funeral and testamentary expenses and debts and the duties payable out of it. Apart from the direction for payment of duties out of the specific gift none of the legacies, except one of 100*l.* which had lapsed, was in terms given free of legacy duty.

Crossman for the Public Trustee.

J. V. Nesbitt for an annuitant. The funeral and testamentary expenses, including the estate duty on personalty, and the debts are payable out of residue as well as out of a special fund; while the special duties, consisting of estate duty on realty and the legacy and succession duties, are payable only out of the special fund. As the special fund

is insufficient to pay all in full the principle of marshalling must be applied, just as it is when realty is charged with debts and general residue is insufficient to pay funeral and testamentary expenses and debts: *Aldrich* v. *Cooper* (1); *In re Roberts.* (2) The special duties will therefore be paid in full out of the special fund, leaving the funeral and testamentary expenses and debts to be paid out of residue in so far as the balance of the special fund is insufficient.

[SARGANT J. referred to Eddis on Administration of Assets, pp. 88, 89.]

The principle applicable is that a person having two funds to resort to for payment shall not be paid so as to disappoint a person payable out of only one of the funds: see Jarman on Wills, 6th ed., vol. ii., pp. 2094, 2095. *In re Grainger* (3) is distinguishable from this case. Here the testator intended the special duties to be paid before creating a net residue. There is therefore a right to marshal.

[SARGANT J. This is not a question of marshalling in the ordinary sense. Marshalling is resorted to to prevent the actual manner of distribution affecting the ultimate course of due administration.]

The general principle enunciated in Jarman on Wills, 6th ed., p. 2094, applies here so as to carry out the testator's intention.

Farwell for the defendants Lawrence. There is no right of marshalling in this case. The general principle it is sought to apply has no application as between beneficiaries under a will. Marshalling only takes place in administering a testator's estate when it has so far been carried out in a manner opposed to the testator's intention. To do what is suggested would be to take something from the residuary legatees in order to give it to the legatees and annuitants. No such equity exists. The whole of the debts and funeral and testamentary expenses and special duties must be paid rateably out of the special fund: compare *Boazman* v. *Johnston* (4), which was however a case under a deed. The

(1) (1803) 1 Wh. & T. L. C., 8th ed., pp. 35, 43.
(2) [1902] 2 Ch. 834.
(3) [1900] 2 Ch. 756, 774.
(4) (1830) 3 Sim. 377.

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sole question is whether the testator has shown an intention that the special duties should be paid in full, if the special fund is insufficient. It is not a question of marshalling but of the testator's intention. *In re Roberts* (1) was a case of marshalling in the true sense. *In re Bate* (2) is explained in *In re Stokes* (3) as not being a case of marshalling. On the construction of the testator's will he has shown an intention to free residue from all payments by creating a special fund to satisfy them. If the special fund is insufficient to pay all in full, they must be paid rateably and then the deficit in the debts, funeral and testamentary expenses will be paid out of residue not by reason of the testator's intention but because the law so provides: *Boazman* v. *Johnston* (4) is directly in point in this case.

C. R. R. Romer for the defendant Allder adopted this argument.

Whitfield Hayes for one of the eight tenants for life adopted the same argument.

Ramsbotham for the hospital. Justice would not be done by marshalling in this case, as the effect would be to cast a greater burden on residue than was intended.

Cur. adv. vult.

Nov. 24. SARGANT J. read the following judgment, in which, after stating the terms of the will, he continued: I have already decided what are the funds and property comprised in the special fund, and I have also decided that the death duties referred to in the gift of the special fund include the estate duties and legacy and succession duties payable on the testator's death on the specific and pecuniary legacies and the annuities given by the will and also on the residue of the proceeds of his real and personal estate; but do not include any estate duty payable on the death of any annuitant or tenant for life under the will and codicil; and further that these death duties are payable primarily out of the special fund in exoneration of the other portions of the testator's estate.

(1) [1902] 2 Ch. 834.
(2) (1890) 43 Ch. D. 600.
(3) (1892) 67 L. T. 223.
(4) 3 Sim. 377.

A further question arises in the probable event of the special fund proving insufficient to pay the debts, funeral and testamentary expenses and death duties charged upon it. Of these charges the debts, funeral and testamentary expenses, and some of the death duties—namely, those on the residuary personalty, and probably the legacy duty on a 100*l.* legacy given free of duty, will be payable out of general residue should the special fund be insufficient to satisfy them. On the other hand some of the death duties, such as those on real estate and on specific legacies and annuities not given free of duty, would not be payable out of general residue, should the special fund be insufficient to pay them, but would, as to any deficiency, be left to be borne by the devises and legacies themselves. The former class of debts, expenses and death duties may be shortly called "general liabilities" and the latter class "particular liabilities." It is suggested that, in case of the special fund proving insufficient to discharge both the general liabilities and the particular liabilities, a process of marshalling should be resorted to; and that the special fund should be applied first in payment of the particular liabilities in full, and as to the residue only in payment of the general liabilities, so as to leave the balance of the general liabilities to be discharged out of the general residue.

This marshalling in favour of the specific and pecuniary legacies and to the prejudice of residue is of course entirely distinct from the ordinary principle of marshalling in the administration of assets, which is a mere process of adjustment directed to ensuring that assets shall ultimately be applied in accordance with their proper order of liability, notwithstanding that in the actual course of administration assets more remotely liable have been used in priority to those more immediately liable. Nor is it sought to be identified with or justified by the well-established rules as to marshalling in the case of mortgages, though its results here would be similar to the results in those cases. The claim is rested on, and said to be justified by, a broad general principle in the administration of assets which is stated in

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the following sweeping terms in Jarman on Wills, 6th ed., at p. 2095—namely, "The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim, or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied. This principle is applied in favour of both creditors and legatees."

It is unnecessary for me to consider whether this broad general statement of principle is completely justified by the cases referred to by the learned author. But it cannot in my judgment apply either necessarily or even prima facie to cases like this where the two classes of claim and the two sets of funds are alike created under the same instrument or set of instruments. In such cases it seems to me that the relative rights of the two sets of claimants against the two sets of funds must depend on the intention of the instrument, as expressed or sufficiently indicated by its terms, and on that intention only.

Here under the will and codicil the special fund has been formed for the purpose of discharging both the general liabilities and the particular liabilities alike, and no indication is given that these two sets of liabilities are to be discharged otherwise than concurrently and pari passu. Under other provisions of the will and codicil one set of persons are given specific bequests and annuities which would but for the exoneration afforded by the special fund be subject to the payment of the whole of the death duties thereon—i.e., the

particular liabilities; and another set of persons are given the residue of the estate, which would but for the like exoneration be subject to the payment of the whole of the debts and of part of the death duties—i.e., the general liabilities. That is the scheme of the testator's bounty. The relations of the special fund and the general residue (both of which form part of the whole estate out of which the general liabilities are payable) are entirely the creation of the will itself. And a process which should, on the special fund proving insufficient to discharge both the special liabilities and the general liabilities, apply the special fund primarily in the payment of the special liabilities, and so benefit the specific legatees and annuitants at the cost of the residuary legatees, would in my opinion result in an alteration as between the two sets of beneficiaries of the benefits conferred on them respectively.

Indeed the fact that any part of the general liabilities undischarged out of the special fund will naturally fall on general residue is, for the purposes of the apparent scheme of the will and codicil, no more important than the corresponding fact that any parts of the particular liabilities which are also undischarged out of the special fund will fall on the specific bequests and annuities. And the claim of the specific legatees to marshal as against the residuary legatees seems to me little, if at all, more meritorious than would be a corresponding claim by the residuary legatees to effect a similar process of marshalling as against the specific legatees and annuitants.

In my judgment this view is entirely in accordance with the views expressed on this point in *Dolphin* v. *Aylward* (1) and with the second decision of the Court of Appeal in *In re Grainger*. (2) Indeed this second case is a stronger one than the present, since there such a process of adjustment was not allowed even against those taking on an intestacy whose position is perhaps hardly as strong as that of residuary legatees. *Boazman* v. *Johnston* (3) is also a stronger case than the present in the same direction.

(1) (1870) L. R. 4 H. L. 486. (2) [1900] 2 Ch. 776.
(3) 3 Sim. 377.

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Accordingly I decide on this point that there is no case for marshalling as suggested and that the whole of both the general liabilities and the particular liabilities are to be discharged rateably out of the special fund.

Solicitors: *Warwick Williams & Marchant; H. Anderson, for A. F. Eaton, Bournemouth; Russell, Son & Fisher; Monier-Williams, Robinson & Milroy.*

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[1921. G. 193.]

Vendor and Purchaser—Sale of Business as going Concern—Date fixed for Completion—Delay in Completion owing to Purchaser's Default—Vendors' Losses in carrying on Business—Notice to Purchaser—Liability of Purchaser to indemnify.

Where by reason of the deliberate default of the purchaser a contract for the sale of premises, together with the goodwill of the business being carried on thereon, is not completed on the date fixed for completion, the vendor is entitled, apart from any express provision in the contract to that effect, to carry on the business at the risk of the purchaser and to be indemnified by him in respect of losses so incurred, provided that he informs the purchaser promptly of what he is doing and that the business is being carried on at a loss.

Dakin v. *Cope* (1827) 2 Russ. 170 distinguished.

Shaw v. *Foster* (1872) L. R. 5 H. L. 321 applied.

WITNESS ACTION.

The plaintiff company was incorporated under the Companies Acts for the purpose of carrying on business as bakers and confectioners and in carrying on this business acquired the leasehold and freehold properties hereinafter mentioned. On January 16, 1920, a receiver and manager of the plaintiff company's business was appointed in a debenture-holders' action and on January 27, 1920, the company went into voluntary liquidation and a liquidator was appointed.

By an agreement in writing dated June 21, 1920, the receiver and the liquidator agreed to sell and the defendant

to purchase at the price of 3800*l.* the leasehold shops and premises No. 1 Park Parade, Harlesden, No. 1 Chippenham Road, Harrow Road, Paddington, and No. 15 Hazel Road, Willesden, for the residue of the respective terms upon which the same were held and subject to the respective rents, covenants and conditions therein mentioned together with the goodwill of the respective businesses of bakers and confectioners carried on thereon and the respective tenants' fixtures, trade utensils and plant and machinery except as therein mentioned; and also the freehold shop and premises No. 91 Barretts Green Road, Willesden. The sum of 380*l.* was paid as a deposit.

Clause 2 of the agreement was as follows: "The purchase to be completed within one month of the approval by the Court of this contract. If not then completed the purchaser to pay interest on the balance of the purchase money at six pounds per cent. or the vendors at their options to take the rents until completion without prejudice to the vendors' other rights. All rents and outgoings . . . . shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require."

Clause 7 stated the characters in which the receiver and liquidator contracted, and continued: "this agreement is entered into subject to the approval of the Court being obtained thereto within twenty-one days from the date hereof. . . . . If the approval of the Court shall not be given as above the contract shall be void . . . ."

On the same day an agreement in similar terms was entered into between the same parties for the sale of the leasehold shop and premises No. 111 High Street, Harlesden, together with tenant's fixtures and fittings and machinery. In this agreement the approval of the Court was to be obtained within one month.

On July 23, 1920, applications were made in the debenture-holders' action for approval of the conditional contracts. These applications came before the Master on July 29, 1920, but before then the titles of the properties had been submitted to the purchaser and there were only three questions

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outstanding on the requisitions. Up to this date there was a waiver of the condition limiting the time for obtaining the approval of the Court. The Master's note of what happened on July 29, 1920, is so far as material in these terms: "Subject to purchaser attending before the Registrar and accepting title by consent of the defendant company order as asked. . . . ." Notwithstanding the pressure brought to bear by the vendors the defendant did not attend and accept the title until October 26, 1920, when an order was drawn up under date July 29, 1921, ordering the premises to be sold with the approbation of the judge. The order then continued: "The purchaser by his solicitors expressing himself content with the title to the respective premises comprised in the conditional contracts . . . . and consenting to be bound by them notwithstanding that the time thereby limited for obtaining the approval of the Court thereto has expired and the defendants by their solicitors consenting" it was ordered that the conditional contracts should be carried into effect.

Subsequently a compromise was made between the company and the debenture holders, and on November 1, 1920, the receiver and manager was discharged, the debenture-holders' action stayed, and the receiver and manager ordered to assign to the company the benefit of all contracts entered into by him as receiver. The estate and interest of the receiver in the two contracts was in fact assigned to the company on December 23, 1920.

No draft conveyance having been received by the vendors' solicitors up to November 22, 1920, they wrote a number of letters pressing for it, and in particular on December 8, 1920, wrote as follows: "We are sorry we are still without the draft conveyance. We telephoned to-day as our instructions in the matter are peremptory. . . . . As your client is well aware the businesses which for months past have been kept open solely for his benefit have been carried on at a loss and of course our clients will hold Mr. Hemmings to strict accountability for the loss, certainly as from the 29th August, by which date the whole matter ought to have been concluded in accordance with the terms of the contract."

No reply was received to this letter, but on December 15 the draft conveyances were forwarded to the vendors' solicitors. These were returned approved on December 28, 1920; and after further pressure the purchaser's solicitors forwarded the engrossments for execution on January 6, 1921. On January 7 the purchaser's solicitors wrote intimating that the purchaser would be ready to take over the businesses on January 15 and on the following day the vendors' solicitors replied again pointing out that the businesses had been carried on since August 29 for the purchaser's account "and as you know losses have been incurred. There is some difficulty in getting out the exact figures of the losses from the receiver. . . . . If we do get the figure we will send it to you so that the amount can be included in the completion statement. Otherwise, of course, the amount, when ascertained, will have to be paid afterwards, as we do not suppose that any of the parties would wish to delay completion on this account." On January 13 the purchaser's solicitors wrote that the purchaser did not admit any such claim on behalf of the vendors.

Further correspondence ensued, as the result of which it appeared that there were two questions outstanding between the parties:—

(1.) Whether the interest on the respective balances of the purchase moneys should run from August 29 or from November 26; and

(2.) Whether the purchaser was liable to pay to the vendors any losses properly incurred by the vendors in carrying on the respective businesses at No. 1 Park Parade, Harlesden, No. 1 Chippenham Road, Harrow Road, Paddington, and No. 15 Hazel Road, Willesden, as from the date fixed for completion.

On January 18, 1921, the plaintiffs issued the writ in this action claiming specific performance of the contracts; a declaration that the plaintiffs were entitled to be indemnified by the defendant against all expenditure incurred by the plaintiffs or by any one on their behalf in carrying on and preserving as going concerns for the defendant the businesses

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comprised in the first of the two agreements ; and an account accordingly.

On May 13, 1921, an order was made in the action by consent appointing the defendant's nominee to be receiver of the property and assets comprised in the two agreements and to manage the businesses the subject of the first of these agreements, the defendant undertaking to be responsible for all outgoings of the businesses from the date of the order.

Sargant J. held on the first of the above questions that there was no valid unconditional contract between the parties in either case until October 26, 1920 ; and accordingly that interest on the respective balances of the purchase moneys only ran from November 26, 1920, as being the date fixed for completion. No report is called for of this part of the decision.

The further effect of the evidence given at the hearing sufficiently appears from the judgment.

A. Grant K.C. and *Farwell* for the plaintiffs. The vendors are entitled to be indemnified against losses incurred in carrying on the businesses after the date fixed for completion. A vendor is a trustee for the purchaser subject to certain limitations in his favour in case the sale goes off : *Shaw* v. *Foster* (1) ; Fry on Specific Performance, 6th ed., p. 638. The difference in the position before and after the date fixed for completion is pointed out in *Rayner* v. *Preston*. (2) If a vendor allows property he has agreed to sell to deteriorate he is liable to have the purchase money reduced by way of compensation to the purchaser : *Phillips* v. *Silvester*. (3) This case was however commented upon by Jessel M.R. at a later stage : see Dart's Vendors and Purchasers, 7th ed., vol. i., pp. 673, 674. That comment seems to have related only to whether there were facts to support the decision. The principle enunciated stands and has been applied in *Royal British Permanent Building Society* v. *Bomash* (4) and by Jessel M.R. himself in *Earl of Egmont* v. *Smith*. (5) Here

(1) L. R. 5 H. L. 321, 338.
(2) (1881) 18 Ch. D. 1, 13.
(3) (1872) L. R. 8 Ch. 173.
(4) (1887) 35 Ch. D. 390.
(5) (1877) 6 Ch. D. 469, 475.

the vendors had sold their businesses as going concerns. If they had failed to carry them on the goodwill would have been destroyed and the purchaser might have repudiated the contract. It would seem to follow that the purchaser is liable for the losses incurred after the date fixed for completion. There is however an authority to the contrary: *Dakin* v. *Cope*. (1) No notice had there been given to the purchaser that the business sold was being carried on at his risk, and this distinguishes it from the present case in view of the letter of December 8, 1920. *Dakin* v. *Cope* (1) is commented on in Dart's Vendors and Purchasers, 7th ed., vol. i., p. 657, but is referred to without comment in Williams on Vendor and Purchaser, 2nd ed., vol. i., p. 520, note x, and in Sugden on Vendors and Purchasers, 14th ed., p. 638. In *Bennett* v. *Stone* (2) the point was left undecided, but the principle that a vendor is a trustee to his purchaser and entitled to be indemnified is recognized in *Bolton Partners* v. *Lambert* (3) and *Dodson* v. *Downey*. (4) In *Foster* v. *Deacon* (5) a vendor was made accountable for deterioration in land sold: compare also *Hardoon* v. *Belilios* (6), where it was held that a person beneficially entitled to shares was bound to indemnify the registered holder against calls.

Galbraith K.C. and *Norman Daynes* for the defendant. It is true that a vendor is in a sense a trustee of the property agreed to be sold for the purchaser and can be made liable for negligence and lack of care: *Phillips* v. *Silvester* (7); *Earl of Egmont* v. *Smith*. (8) But he is under no obligation to carry on a business, and even if he does so in order to preserve the goodwill he has agreed to sell, the purchaser cannot be made liable for losses so incurred: *Dakin* v. *Cope* (1); see also Webster on Conditions of Sale, 3rd ed., p. 344, and Farrer on Conditions of Sale, 2nd ed., p. 77. The vendor carries it on for his own profit or loss: *Leggott* v. *Metropolitan Ry. Co.* (9)

(1) 2 Russ. 170, 179.
(2) [1902] 1 Ch. 226, 237.
(3) (1889) 41 Ch. D. 295, 302.
(4) [1901] 2 Ch. 620.
(5) (1818) 3 Madd. 394.
(6) [1901] A. C. 118.
(7) L. R. 8 Ch. 173.
(8) 6 Ch. D. 469, 475.
(9) (1870) L. R. 5 Ch. 716, 719.

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[SARGANT J. In that case the railway company were not buying the business as a going concern.]

They were acquiring the licences. In any case the law is settled by *Dakin* v. *Cope* (1) apart from some special agreement between the particular parties. Here the provision in the contract that all rents and outgoings must be apportioned "up to the completion" does not affect the position. It refers to actual completion and not the date fixed for completion: compare *Barsht* v. *Tagg*. (2) The evidence in the present case shows that the defendant did not know that losses were being sustained until he received the letter of December 8. Clearly he cannot be made liable for previous losses; but it is contended that he is also not liable for losses after that date.

[SARGANT J. What do you say was the vendors' duty in the present case?]

They should have told the purchaser that the businesses could only be carried on at a loss and obtained his instructions. Even the letter of December 8 did not make their position sufficiently clear.

The numerous authorities cited on behalf of the plaintiffs only show that as from the date of a contract of sale the vendor must take reasonable care of the property he is selling. Apart from a dictum of Kekewich J. in *Bolton Partners* v. *Lambert* (3), there is no authority to the effect that a liability can be thrown on the purchaser for losses.

[They also referred to Fry on Specific Performance, 6th ed., p. 605, and Halsbury's Laws of England, vol. x., p. 313.]

Farwell in reply. *Dakin* v. *Cope* (1) is not inconsistent with the principle that a vendor is a trustee for the purchase of the property sold. The decision in *Dakin* v. *Cope* (1) turns on two facts—namely, that relief in respect of the carrying on of the business had not been asked in the bill and that the vendor failed to show that the purchaser knew of the loss that was being incurred.

The vendor is a trustee for the purchaser and entitled

(1) 2 Russ. 170, 179. (2) [1900] 1 Ch. 231.
(3) 41 Ch. D. 295, 302.

therefore to be indemnified by his cestui que trust; but this right of a trustee to be indemnified is subject always to his acting reasonably. In *Dakin* v. *Cope* (1) the vendor was regarded as a trustee who had acted unreasonably in carrying on a business at a loss for two and a-half years without giving notice to his cestui que trust of the position in order that the cestui que trust might decide what he wished his trustee to do. That is the ordinary position of a trustee whose cestui que trust is sui juris. An ordinary trustee who carried on a business at a loss without consulting his cestui que trust who was sui juris would not be entitled to throw the loss on the cestui que trust. So viewed *Dakin* v. *Cope* (1) is consistent with *Phillips* v. *Silvester* (2) and *Earl of Egmont* v. *Smith*. (3) Here notice of what was happening was given promptly by the vendors and they are entitled to be indemnified.

SARGANT J. In this action two points arise on two contracts for the sale of one freehold and four leasehold premises and the goodwill of the businesses carried on at three of the leasehold premises. The questions are, first, from what date interest runs on the purchase money, and, secondly, whether the vendors are entitled to throw on the purchaser losses incurred by them in carrying on the businesses. [His Lordship then stated the facts and after deciding the first question continued:] I think on the evidence it is established that between July 29, 1920, and the end of the following November the purchaser was aware that the businesses were being carried on at a loss. If he did not know it personally his employee Morris had ascertained it on his behalf and Morris' knowledge must be taken as knowledge by the purchaser himself. I accept on this point the evidence of Mr. Hyland, the manager of the plaintiffs' businesses, and I rely also on the admissions that were extracted from Morris, who naturally did his best to safeguard his employer's interest.

(1) 2 Russ. 170. (2) L. R. 8 Ch. 173.
(3) 6 Ch. D. 469.

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Although there was a binding contract on October 26 the purchaser took no steps to get the conveyances drafted, and his solicitor admitted candidly that the delay was due to the purchaser's instructions not to hurry matters on. I am convinced that but for the plaintiffs' delay after October 26 the sale could have been completed by November 26, which on the view I have taken was the date fixed for completion. It will be noted that the period of one month after the approval of the contract was allowed by the contract for the investigation of the title as well as the preparation of the conveyances. But the title had already been accepted before the date when the contract was approved. Any delay after November 26 was in my opinion due to the deliberate desire of the purchaser to put off completion of the contract, partly because he was occupied with other matters and partly because he was by then anything but enamoured with the businesses he had purchased. This may have been due to his knowledge that the businesses were being carried on at a loss, though it is fair to say that the purchaser did not attach much importance to their being losing businesses but rather looked to the volume of business being done, as he thought that with his organization he would be able to make them pay. I hold that the delay after November 26 was due to the deliberate default of the purchaser.

The vendors found themselves in the position of having businesses which they had sold and which were being carried on at a loss. What were they to do? On December 8, 1920, the vendors' solicitors wrote a most important letter to the defendant in these terms. [His Lordship read the letter.] That letter seems to me to be a perfectly clear indication to the defendant that the three businesses not only had been but were being carried on at a loss, and also that they were being carried on by the vendors for the account of the purchaser and to protect the goodwill of the businesses for him.

From that time therefore the defendant undoubtedly had clear notice of the state of affairs and was bound in my view

to tell the vendors if he wished to put an end to it. He might have told them to continue to carry on the businesses or have requested them to shut down the businesses; or he might have arranged that his own manager should take charge of the businesses. As a matter of fact he pursued a policy of masterly inactivity. The matter was again called to the purchaser's attention on January 8, but once again he did nothing. Ultimately on January 18 the present action was commenced. In the course of the action the purchaser at last woke up to the position and made an arrangement by which his own manager was put in charge of the businesses on the terms that from then on he was to take the profits or bear the losses of the businesses.

The question therefore is whether the losses from November 26 to December 8 and afterwards until May 13, when the plaintiffs' manager went into possession, are to be borne by the purchaser. I ought to point out that in the letter of December 8 it was suggested that the purchaser had been for a long time aware that the businesses were being carried on at a loss. If that had been incorrect, it may be assumed that the purchaser would have written a letter repudiating any such knowledge, and in the witness box he admitted that it was a letter which he ought to have answered. In view of the construction I have put on the contract, it follows that any losses incurred up to November 26 must necessarily be borne by the vendors. I have to consider only the losses from November 26 to December 8, 1920, and afterwards.

The general principle applicable here was stated by Lord Cairns in *Shaw* v. *Foster* (1) as being that as between vendor and purchaser the vendor is as from the date fixed for completion a trustee of a somewhat modified kind. He says: "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of equity of the property, subject only to this observation,

(1) L. R. 5 H. L. 321, 338.

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that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

What was the property sold here? As to the three shops in which businesses were being carried on the sale related not only to the bricks and mortar sold but also to the three businesses sold as going concerns. In those circumstances the vendors were no more entitled to let these businesses lapse than to allow the bricks and mortar to fall into decay. If the vendors had failed to deliver bread on the rounds the whole goodwill would have been destroyed and the purchaser would have been entitled to repudiate the contract on the ground that he was not getting what he had agreed to purchase—namely, these businesses as going concerns.

In such circumstances a vendor is entitled prima facie to continue to carry on the business he has sold at the risk of the purchaser, subject to his taking steps to inform the purchaser with reasonable promptitude of what he is doing. In the present case there was a delay in giving notice from November 26 to December 8; but in my judgment that was in no degree unreasonable. On the contrary, my view is that the vendors pointed out with considerable promptitude the effect of the purchaser's delay.

In view of the statement made to the purchaser by the vendors on December 8, which showed that the businesses were continuing to be carried on at a loss and that the vendors were looking to the purchaser to indemnify them, I have no doubt that the defendant was by his silence acquiescing in the status quo being continued. So that from that time forth at any rate the vendors are entitled to be indemnified by their cestui que trust, the purchaser. But I apply the principle I have referred to not only from

December 8 onwards, but also to the short antecedent period from November 26 to December 8, as the vendors made no unreasonable delay in notifying the purchaser as to the position.

The case of *Dakin* v. *Cope* (1) has been very much pressed on me. But in my judgment that case when carefully considered does not form an exception to the general rule laid down by Lord Cairns in *Shaw* v. *Foster* (2) that the vendor is a trustee for the purchaser of the property sold—a general rule which I think applies to the goodwill of a business sold as a going concern.

In *Dakin* v. *Cope* (1) there was delay in the completion of the sale of a business owing to difficulties as to title, and the vendor carried on the business for nearly two and a half years after the date fixed for completion without giving any notice to the purchaser of what he was doing, or giving him any opportunity of deciding the course to be adopted. Further, no special averment was made in the bill of these facts. The ordinary decree for specific performance was asked for and obtained, but it was drawn up so as to render the purchaser liable for losses incurred in carrying on the business. The question was whether in the circumstances it ought to be drawn up in this form. Lord Eldon called attention to the fact that no such case was raised by the bill. It appeared also that in answer to a question he had asked in the course of the argument he was told that no notice had been given to the purchaser that the trade would be carried on at his risk. Lord Eldon did not therefore think it just to impose on the purchaser the loss sustained by the vendor. It was a very different case from the present one, and it stands on its own facts and does not go to the extent of deciding that, when the goodwill of a business has been sold, the vendor is not entitled to throw on the purchaser losses incurred by him in carrying on the business after the date fixed for completion, when he has acted reasonably and told the purchaser of the loss that is being incurred and given him an opportunity of saying what course should be pursued; though I

(1) 2 Russ. 170. (2) L. R. 5 H. L. 321, 338.

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do not say that a direction by the purchaser to close down the business at once must be necessarily complied with, as the vendor has to consider his own position in case the purchase does not go through. Here notice was given to the purchaser that the businesses were being carried on at a loss and he kept silent and allowed this state of affairs to continue. In those circumstances he is in my opinion liable to indemnify the vendors against these losses from that time, including the losses incurred over the short antecedent period between November 26 and December 8, 1920. There must be an inquiry as to the amount of the losses properly incurred by the plaintiffs in carrying on the businesses between November 26, 1920, and May 13, 1921, when the defendant's receiver and manager went into possession.

Solicitors: *Fairchild Greig & Co.; Sturton & Sturton.*

H. C. G.

RUSSELL J. 1921 *Dec.* 9.

FAVORKE *v.* STEINKOPFF.

[1921. S. 2224.]

Will—Trust Fund invested in Germany—Charge created by paramount Power—German Subject—Treaty of Peace Order, 1919.

A testator, whose domicile was English, by his will directed his trustees to invest a certain sum in the Hamburg State Loan and from the income thereof to pay a number of annuities, and, as and when the annuities fell in, to apply the income and the capital so set free in accumulating a trust fund. That trust fund was also invested in the Hamburg State Loan. The annuitants, and those interested under the will in the trust fund, were German nationals:—

Held, that the interests of the beneficiaries under the will were charged under the Treaty of Peace Order, 1919, as being "property, rights and interests" in the United Kingdom.

THIS was a summons taken out by the trustees of the will of Edward Steinkopff to determine whether the interests of certain beneficiaries under the will were charged by the Treaty of Peace Order, 1919, which by s. 1, sub-s. xvi., provides that: "All property, rights and interests within His

Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged."

The Treaty of Peace with Germany came into force on January 10, 1920.

The testator died domiciled in England in 1906, and by his will appointed British trustees and directed them to set aside 765,000 marks in the 3 per cent. Hamburg State Loan upon trust, in the first place to pay annuities to nine persons for their lives. These annuitants were now all dead except one, Friedrich Maak, a defendant who was entitled to an annuity of 395 marks.

Subject to the payment of the annuities the testator directed that, as and when an annuitant died, the income set free, together with portion of capital which had produced the annuity, should be accumulated until a sum of 300,000 marks was reached. That sum was reached and constituted as a fund under an order of the Court as from January 2, 1914, the trustees being directed to invest and retain a fund of 300,000 marks at the middle market price of the day. This was also invested in 3 per cent. Hamburg State Loan. Of this fund the defendant Carl Steinkopff was made tenant for life, the defendant Sophie Steinkopff, his wife, taking a life interest if she survived him, and on her death it went to their three children. The trustees were also directed, after having accumulated the 300,000 marks, to accumulate a sum of 100,000 marks in the same way, as and when the annuities fell in, and pay 50,000 marks to each of the defendants Edward Winter and Gerda Ihnen. The fund had proved sufficient to provide those two sums.

W. R. Sheldon for the trustees.

Clauson K.C. and *Bryan Farrer* for the German beneficiaries under the will. The scrip, which consists of bearer bonds, is in England, but the bonds are payable in Germany. The "property" was situate in Germany before the Treaty of Peace with Germany came into force, and is situate there

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now. If the testator had directed that his property in Germany should go to our clients, and his property in England to other persons, our clients would have been entitled to these bearer bonds as property situate in Germany: *In re Clark.* (1) In that case the bonds were payable in South Africa, just as here they are payable in Hamburg. These funds are in Germany, and therefore any "interest" arising from the income and capital accumulated is in Germany. The greater includes the less. The fund of 300,000 marks which was set aside out of the accumulations arose solely from the German fund and the income of part of that fund. That fund was a German fund when the Treaty of Peace came into force.

Gavin Simonds for the Crown (*Sir Gordon Hewart A.-G.* and *Dighton Pollock* with him). These beneficiaries take an interest under an English will, with English trustees, and their right is to call on the trustees to carry out the trusts of the will, and, if they do not, to apply to the Court to enforce those trusts. That right is a chose in action, and a chose in action is situate where it is enforceable. The interests of these German beneficiaries are therefore charged under the Treaty of Peace Order, 1919.

Bischoff for the person, a British national, entitled to a life interest in the residue. My client's interest is not in question on this application.

RUSSELL J. It is argued by Mr. Clauson that the interests of his clients are not charged by the Treaty of Peace Order, 1919, and he puts his argument in this way. He says there is authority, which is binding on me, that bonds of a foreign country are not property situate in this country, and that certainly bearer bonds of a foreign country are not property situate in this country for the purpose of dividing the testator's property into English assets and foreign assets. For that he cites the case of *In re Clark.* (1) In that case the point was this: the testator had separated his property into two classes and had given one class to one set of trustees

(1) [1904] 1 Ch. 294.

and the other class to another set of trustees; he bequeathed all his personal estate in the United Kingdom to certain persons, whom he called his Home Trustees, upon certain trusts, and he bequeathed all his personal estate in South Africa to certain other persons, whom he called his Foreign Trustees, upon other trusts. The question which Farwell J. had to decide was which of those two sets of trustees was entitled to certain bearer bonds of a waterworks company in South Africa. The learned judge held that the bearer bonds of the waterworks company in South Africa were not given to the Home Trustees, but to the Foreign Trustees. He decided that on this footing, that with regard to bond debts it was conceded that if they were on the same footing as simple contract debts the rule was, in construing a will, that the debts, so far as they could have a locality at all, were to be considered to be located where the debtor was resident, and for this purpose he did not see any ground for drawing a distinction between a bond debt and a simple contract debt. He accordingly held that the bonds were locally situated where the debtor was resident. I need hardly say that I cast no shadow of doubt upon the correctness of that decision, but the question which I have to determine is wholly different. These German nationals undoubtedly have a property, right and interest in this trust fund, and the question is whether that property, right and interest is situate in this country or not. It seems to me that for the purposes of the Treaty of Peace Order it is situated in this country. Take the case of one of the beneficiaries, Mr. Maak, which is perhaps the strongest case in Mr. Clauson's favour. The annuitant is entitled to an annuity of 395 marks. What are his rights under the will? He is a beneficiary under an English will, with English trustees, and he is entitled to go to those trustees and say: "You, the English trustees, must pay me so many marks a year out of this particular fund which the testator has designated for that purpose." The actual state of investment of the particular trust fund appears to me to be entirely irrelevant. The investment could be altered from time to time, and there would be no difficulty

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in having the fund invested in consols. Maak's right is a right against the trustees, a right to call on them to do their duty under the will, and, if they do not, to come to the Court here and ask to have the estate administered according to the trusts of the will. That right seems to me to be a chose in action, and a chose in action must be regarded as situate in the country where it is enforceable. It appears to me that the right of all these beneficiaries is a right to go to the trustees and ask them to discharge their duty as trustees under the English will, or, if they do not do that, to come to the Court in this country and ask to have the trusts of this English will administered by the Court. The result is that in my view the first question asked by the summons: "Whether all or any and which of the rights and interests under the said will and codicil of the defendants Carl Steinkopff, Sophie Steinkopff, Friedrich Maak, Edward Winter, and Gerda Ihnen respectively, or any and which of these are charged by the Treaty of Peace Order, 1919?" must be answered in this way: "That all the rights and interests of these defendants are charged by the Treaty of Peace Order, 1919."

Solicitors: *Elkin, Henriques & Harford; Coward & Hawksley, Sons & Chance; Treasury Solicitor.*

J. B. B. M.

CANVEY ISLAND COMMISSIONERS *v.* PREEDY.

EVE J.
1921
Nov. 30;
Dec. 1, 2, 5, 8, 13.

[1920. C. 2314.]

*Foreshore—Trespass—Sea Wall—Removal of Drift—Right to Protection—Possession—Statutory Title—*32 *Geo.* 3, *c.* 31, *ss. x., xi., xii., xiii., xiv., xxxii.—The Canvey Island (Sea Defences) Act,* 1883 (46 *&* 47 *Vict. c. lxxiii.*), *ss.* 6, 23, 24, 27, 31.

The plaintiffs were incorporated under the Canvey Island (Sea Defences) Act, 1883, for protecting Canvey Island in Essex from inundation by the sea. They succeeded former commissioners appointed by an Act of 1792 (32 Geo. 3, c. 31), which contained a power for these commissioners under s. xiii. to erect a new sea wall further inward, on giving compensation to the owner whose land was taken for this purpose. In 1813 the new wall, 4300 feet in length, was built, and 150*l.* given as compensation to the owner of the land taken. Under the Act of 1883 the property and rights of the former commissioners were vested in the plaintiffs who had power under that Act to hold lands. The plaintiffs claimed to be owners in possession of the foreshore between the new and the old wall. The defendant claimed under a conveyance of April, 1919, to be the freeholder in possession of a strip of land comprising part of this foreshore, and to be entitled as of right to excavate and remove shells and other drift even although, as the plaintiffs alleged, it deprived the new wall of protection and support, and exposed it to injury by the action of wind and water. The greater risk to the wall in consequence of the defendant's action was established by the evidence. In an action by the plaintiffs to restrain the defendant from so removing the drift, and from trespassing on their land:—

Held, that, assuming the strip in question to be the defendant's freehold, the plaintiffs were still entitled to an injunction restraining him from so removing drift from the strip as to expose their wall and works and the lands protected thereby to greater risk of inundations of the sea: *Attorney-General* v. *Tomline* (1879) 12 Ch. D. 214; (1880) 14 Ch. D. 58 followed.

Held, further, that the plaintiffs had established their statutory title under the Acts of 1792 and 1883 to the whole of the land taken and set out pursuant to s. xiii. of the first Act, and had exercised specific acts of ownership over the foreshore. The possession of the plaintiffs and of the defendant being at most doubtful or equivocal the law attached possession to the title: *Jones* v. *Chapman* (1848) 2 Ex. 803; *Ramsay* v. *Margrett* [1894] 2 Q. B. 18, 27.

Held, therefore, that the defendant was a trespasser, and must be restrained from excavating or removing stones, shingle, shell or soil from the particular strip of foreshore and from otherwise trespassing on the same. The plaintiffs would be awarded 40*s.* damages.

THE plaintiffs were a corporate body incorporated by an Act of 1883 (46 & 47 Vict. c. lxxiii.), entitled "An Act for more

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effectually protecting from inundation by the sea and for otherwise improving the Island of Canvey in the county of Essex, and for other purposes," the short title of which Act was "The Canvey Island (Sea Defences) Act, 1883." The plaintiffs were so incorporated in succession to certain former commissioners constituted by an Act of 1792 (32 Geo. 3, c. 31), being an Act for more effectually embanking, draining, and otherwise improving the said Island. By s. x. of this Act of 1792 certain walls, or embankments, and other works then already executed to protect the said Island from inundation by the sea, as well as the walls, banks, and other works to be executed by the former commissioners under the Act of 1792 for the purpose of embanking, preserving and draining the said island and the right and property to and in the same, were vested in the former commissioners, and they were authorized to bring any action against any person who should dig up, spoil or injure any of such walls or banks or other works. By ss. xi. and xii. the former commissioners were entrusted with the duty of maintaining the works so vested and of executing and maintaining such other works as should be necessary for the protection and drainage of the Island; and by s. xiii. the former commissioners were empowered, in case they thought it expedient that the walls, embankments, or works then made and erected, or thereafter to be made and erected, should be set further inward into the land and that a larger part of the Island should be set out for a foreland for the preservation of the residue thereof, to set the said walls, embankments, or works further inward, on making reasonable satisfaction to the persons whose land should be so taken or left out for such purpose as aforesaid. Under s. xiv., if the owners of the land taken should not agree with the commissioners as to the value, the same was to be ascertained by a jury. Sect. xvi. provided for the application of purchase money belonging to corporations or other incapacitated persons which was to be reinvested in other lands to be conveyed and settled as therein provided. Sect. xxxii. enacted that if any person "shall wilfully and maliciously cut, break down, burn, pull up, destroy or damage

any bank, wall, pile, sluice, or other work," then erected or vested in the former commissioners, or which should be erected, by virtue of the Act, every such person so offending and being thereof lawfully convicted, should be liable to the like pains and penalties as in cases of felony.

In 1812 and 1813 the former commissioners, in exercise of their powers under s. xiii. of the Act of 1792, erected a new wall of about 260 rods in length from east to west, from a place called Lublings Creek at the west end to a farm belonging to James Ford on the east, and reasonable satisfaction was made to the persons whose land was taken or left out for such purpose. 150*l.* was paid to a Mr. Wilson in compensation for his land. The result of this new work was to leave certain land between the new wall and the old wall. Broken portions of the old wall still remained and were marked "breakwater" on the Ordnance Map.

By s. 6 of the Act of 1883, for the purpose of the execution of the powers and provisions of the Act of 1792, a body of fifteen commissioners was incorporated by the name of the Canvey Island Commissioners with power to acquire and hold lands for the purposes of their constitution. By ss. 23 and 24 the commissioners had power to make byelaws (inter alia) "for prohibiting persons from cutting tunnels or drains into through or otherwise injuring any wall, slope, or other work for the time being under the control of the Commissioners"; and for imposing penalties for offences against the same. (No byelaws were ever in fact made under these powers.) By s. 27 all property, real and personal, vested in the former commissioners, and all powers, rights, duties, liabilities, and obligations, exercisable by those commissioners under the Act of 1792 or otherwise, were, subject to certain provisions of the Act of 1883 (which do not affect the present action), transferred to and vested in the plaintiffs. And by s. 31 the duty of maintaining, repairing, and renewing all walls, banks, and other works, from time to time vested in the plaintiffs under the Act of 1792 or the Act of 1883, was cast upon the plaintiffs. The plaintiffs by their claim alleged that they were at all material times

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in possession of the land between the new and the old wall, and that in course of time a large mass of shell and shingle accumulated on the said land which had been increased by a groyne erected by the plaintiffs at right angles to the new wall near to a point known as Leigh Beck, and such accumulation was a valuable protection to the new wall. They alleged that the defendant had trespassed on the said land near the groyne and wrongfully excavated and removed quantities of shell and shingle, and claimed the right so to do. That such excavation had deprived the new wall of the protection and support at that point which it had from the shell and shingle, and exposed it to the action of wind and water which would seriously endanger the wall to the injury and damage of the plaintiffs as the body entrusted with its repair and maintenance. The plaintiffs accordingly claimed (1.) an injunction to restrain the defendant and his servants from excavating or removing any stones, shingle, shell, or soil being, or lying adjacent or near to the walls, banks, or other works of the plaintiffs so as to injure, weaken, or endanger such walls, banks, or other works, or to deprive them of support or shelter and protection from wind and water, and from trespassing or interfering with any walls, banks, or other works vested in the plaintiffs by virtue of the Acts of 1792 and 1883. (2.) Damages. By his amended defence the defendant, Nathaniel Preedy, denied the material allegations in the statement of claim, and particularly that the land between the old and new wall was vested in the plaintiffs, or that they were in possession of it. He asserted that the land in question was foreshore. Alternatively he pleaded that any sand or shell removed by him had been surface sand or shell and lawfully removed and was speedily replaced by the action of the tide in washing up fresh sand or shell; and, further, that the new wall was not endangered by such removal. He also claimed that for thirty years past the owners of the land between the two sea walls had taken and carried away surface sand, or shell, for such purposes as they might require. He further relied upon ss. 23 and 24 of 46 & 47 Vict. c. lxxiii. (under which the commissioners

could make byelaws to prevent any person from injuring walls or other works), and that the plaintiffs were not entitled to initiate the present proceedings. Various witnesses were examined on both sides, those for the plaintiffs deposing to the very serious breaches which had been made in the wall at times of high tide and gales during past years, and that on one occasion 1500 acres of the island had been flooded.

Witnesses for the defendant gave evidence of the general practice of owners of the foreshore taking sand and shells therefrom for use in building and making paths; that in 1900 the foreshore was mainly composed of mud; but that in 1901 one F. Hester placed a number of barrels of cement (taken from a ship wrecked off the island) at right angles to the new wall and close to the boundary of the defendant's strip, and that these barrels gradually caused an accumulation of shells and shingle, the surface of which the defendant had removed; and that the existence of these barrels was known to the plaintiffs, who allowed them to remain. The result of the evidence and the nature of the defendant's title sufficiently appears from the judgment of the Court.

Clayton K.C. and *J. E. Harman* for the plaintiffs. The plaintiffs have a common law right of support for their wall not depending upon easement. They were in possession of the foreshore, which was vested in them by virtue of the statutes, and were under an obligation to prevent shells or shingle from being dug and carried away so as to exposé the land of the island to inundation. "Foreshore" is defined in Lord Halsbury's Laws of England, vol. 28, p. 361, and at p. 382 it is stated that "It is part of the prerogative and is the duty of the Crown to preserve the realm from the inroads of the sea by appropriate defences," and the same rule applies to a subject. We come within the principles laid down in *Attorney-General* v. *Tomline.* (1) In the present case the defendant has been removing the natural barrier of the accumulated shingle and so exposing the sea wall to

(1) 12 Ch. D. 214; 14 Ch. D. 58.

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grave danger in the future. The plaintiffs have also statutory rights under the Act of 1792 (32 Geo. 3, c. 31), ss. x., xi., xii., and xiii., and under the Act of 1883 (46 & 47 Vict. c. lxxiii.). When the new wall, which is 4300 feet long, was made, 150*l.* was allowed to a Mr. Wilson in reasonable satisfaction for his land which was taken for this purpose. We also rely on various acts of ownership and possession exercised by the plaintiffs between 1902 and 1910 (*a*) in erecting notice boards warning persons against removing the shell and sand, and (*b*) in giving a licence for the erection of a boathouse, and (*c*) agreeing to a jetty being made. But no licences were given for the removal of shingle.

Lucien Fior and *A. S. Diamond*, for the defendant, took the preliminary objection that having regard to s. xxxii. of the Act of 1792 the commissioners were enabled to take proceedings against any person maliciously damaging any bank or other work vested in the commissioners, and on conviction such person should be liable to the like pains and penalties, "as in cases of felony," and therefore the present proceedings ought to be stayed until the plaintiffs had first taken criminal proceedings for what was equivalent to a felony by the defendant: *Smith* v. *Selwyn*. (1)

[EVE J. intimated that he would deal with that point when he gave judgment.]

The defendant has a good title and is in possession of the strip which was conveyed to him by the deed of April 14, 1919. The strip of foreshore being part of the defendant's property he is entitled to take away that which accrues to his land by reason of artificial means. The barrels of cement placed by an owner of the foreshore in 1901 in a position to collect the drift created this shell barrier. Before that the evidence is that there was chiefly mud on the foreshore and scarcely any shell or shingle at that point. *Attorney-General* v. *Tomline* (2) is distinguishable from the present case, because in that case the drift was the only barrier between the sea and the land which was threatened, whereas here it is the wall itself and protective

(1) [1914] 3 K. B. 98. (2) 12 Ch. D. 214; 14 Ch. D. 58.

works which are threatened. And a further difference is that in the present case the drift has been at any rate increased materially by the placing of the barrels of cement which prevented the accumulations from being washed back again by another tide. It is not for the defendant to establish his title but for the plaintiff to prove his. There is nothing in the earlier Act of 1792 enabling the commissioners to hold land. There was no obligation on them to maintain the beach. Our contention is that it is the defendant's land which has been reclaimed, if not, it is foreshore, and the Attorney-General should have been made a party: *Attorney-General of Southern Nigeria* v. *Holt & Co.* (1) With regard to the claim for damages, no damage has been in fact done to this sea wall, and it is in no more danger now than before 1900, when there was no shell there. An injunction, if granted, should be limited to the strip of the defendant. For thirty-five years shell has been taken from this foreshore at various points, and the commissioners have stood by and brought no action: that amounts to laches.

[Reference was also made to *Grand Junction Water Works Co.* v. *Hampton Urban Council.* (2)]

Clayton K.C. in reply. No byelaws were ever made under the Act of 1883. As to the point that a felony has been committed, there are many answers: it was not raised by the pleadings; there was no actual injury done to the wall or banks within the terms of the statute, and there was no evidence that it was maliciously done; lastly, it was a question of title, a claim as of right, by the defendant, and the jurisdiction of a magistrate would have been ousted if proceedings had been taken. Assuming that the defendant was the owner of this strip in possession the case of *Attorney-General* v. *Tomline* (3) still applies, and the present is an a fortiori case arising under the Statute of 1792, which gives a right and imposes a duty. An injunction is the proper remedy as possession follows the title, and the title to this foreshore is proved to be in the commissioners. Possession is not a

(1) [1915] A. C. 599.
(2) [1898] 2 Ch. 331.
(3) 12 Ch. D. 214; 14 Ch. D. 58.

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mere physical fact. The acts of ownership are also sufficient to establish possession.

If two people are in possession claiming adversely the person who has the title is to be deemed in possession: *Jones* v. *Chapman* (1); *Ramsay* v. *Margrett*. (2) The defendant is therefore a trespasser and the plaintiffs are entitled to the injunction claimed against him.

Cur. adv. vult.

Dec. 8. EVE J. The constitution, powers, and duties of the plaintiffs in this action are sufficiently and accurately stated in the first four paragraphs of the statement of claim. It has been proved that in the years 1812 and 1813 their predecessors in exercise of their powers under s. xiii. of the Act of 1792 substituted further inland the new wall referred to in para. 5 for the pre-existing wall and paid to one Wilson, the then owner of the land on which the new wall was built and lying seaward thereof as far as the old wall, the sum of 150*l.* as reasonable satisfaction under the section. Wilson's land in respect of which this payment was made covered an area of about $3\frac{3}{4}$ acres, and the payment of 150*l.* was fixed on the basis of the area being worth 40*l.* an acre. The new wall is 4300 feet in length, and the defendant, alleging that he is the owner in fee in possession of a strip of the land (formerly Wilson's) intervening between the two walls and having a frontage along the new wall of 100 feet from east to west, has removed and carried away from the said strip part of an accumulation of sand, shell, shingle, and other drift some 3 feet in depth, and asserts his right to remove and carry away all such drift, even though such removal and carrying away exposes the plaintiff's wall and works and the lands protected thereby to greater risk of inundations of the sea. That this greater risk exists in consequence of the defendant's acts the plaintiffs have established by uncontradicted evidence, and the first question I have to decide is whether, assuming the strip to be the defendant's freehold, the plaintiffs are entitled to an injunction restraining him

(1) 2 Ex. 803. (2) [1894] 2 Q. B. 18, 27.

from so removing drift therefrom as to expose their wall and works to the greater risk I have indicated.

I think the answer to this question is to be found in the judgments in the case of *Attorney-General* v. *Tomline* (1), more particularly in those of Fry J. and Cotton L.J. The defendant alleges, and it appears to me correctly, that the strip is foreshore. He is therefore, on the hypothesis upon which this part of my judgment proceeds, in the same position as Colonel Tomline was in that case, that is to say, an owner of foreshore on which has been accumulated by the action of successive tides a natural barrier against the sea. This barrier he is claiming a right to remove, notwithstanding that by so doing he will expose the plaintiffs' wall to greater risk of damage or destruction by the sea, and the land beyond it to increased chances of being inundated.

No doubt there is a distinction between this and *Tomline's Case* (2) in that in the latter the drift constituted the only barrier between the incoming sea and the threatened land, whereas in this case the threatened premises are themselves a wall and drainage system erected and made as protective works, but I do not think this distinction is material. The new wall was erected further inland, in order to set out a larger part of the island for a foreland for the preservation of the residue thereof (s. xiii. of the Act of 1792), and it cannot, in my opinion, be the law that the owner of the foreland or foreshore is relieved from his obligation not to destroy the natural barrier because the owner of the land abutting on the natural barrier takes the further precaution of erecting an artificial barrier behind the natural one formed by the foreshore itself. I think the concluding part of Cotton L.J.'s judgment in *Tomline's Case* (2) commencing with the words "Theoretically for the purpose of considering" is conclusive on this part of the case. It is true that a substantial part of the drift on the strip has been accumulated and retained there in consequence of the placing on the foreshore some twenty years ago by some one other than the plaintiffs or the defendant of certain barrels full of damaged

(1) 12 Ch. D. 214; 14 Ch. D. 58. (2) 12 Ch. D. 214; 14 Ch. D. 58, 69-70.

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cement. These have to some extent undoubtedly prevented the drift deposited by one tide from being withdrawn by a later tide, and it was argued that this again distinguishes this case from *Tomline's*. (1) I do not think so. Groynes and artificial means to retain drift on the foreshore are of constant occurrence. Their presence often enables an accumulation to be maintained sufficient to afford adequate protection to the inlying land and at the same time leave a margin which can safely be removed for commercial purposes. I cannot treat the presence of these barrels as modifying the defendant's obligations towards the plaintiffs, and the result is that even if the defendant be in fact the owner in fee of the strip the plaintiffs are, in my opinion, entitled to the qualified injunction asked for in the first part of para. 1 of their claim.

But the plaintiffs deny that the defendant has any interest as owner or otherwise in the strip, and alleging that they are the owners thereof under a statutory title they claim an injunction to restrain the defendant from removing any part of the drift and from otherwise trespassing on the strip.

The determination of this question depends on the construction of the Act of 1792. The exercise of the powers conferred by s. xiii. involved two operations, the taking of land further inward for the erection thereon of the new wall and the setting out or leaving out as additional foreshore of the land lying between the new wall and the site of the old wall. The reasonable satisfaction which these operations entailed had to be made "to the person or persons whose lands shall be so taken or left out." There can be no question but that the new wall and the banks and works connected therewith vested in the commissioners by virtue of s. x. of the Act, but there are no express words in that section or elsewhere in the Act which can be pointed to as vesting in them the land set out or left out as additional foreshore.

On the other hand, it is difficult to see how the owner could have any continuing interest in the land taken or set out after satisfaction had been made, for by s. xiv. the measure of

(1) 12 Ch. D. 214; 14 Ch. D. 58.

satisfaction was obviously the value of the land, and by s. xvi. the money or recompense to be paid for any land taken or left out for a foreland belonging to any corporation or other incapacitated person had to be paid to the nominees or trustees therein mentioned "in trust with all convenient speed to be re-invested in the purchase of other lands which shall be conveyed and settled upon and subject to the like uses, trusts, and limitations, as the land so taken or left out as aforesaid belonging to such corporation or other incapacitated persons shall be then settled, limited, or assured."

On the whole, I think that the effect of the statute must have been to vest in the commissioners the whole of the land taken and set out pursuant to s. xiii.

Of so much of Wilson's land as was used for the erection of the new wall and works the plaintiffs and their predecessors have been in possession for over a century, and it may be that this ought to be construed as possession of the whole area, but if not they rely on specific acts of ownership exercised by them on the foreshore. In 1902 they gave one Hester a revocable licence to erect a jetty from land in the rear of their new wall to the sea, crossing their wall; the same to be erected in strict accordance with certain plans and to the satisfaction of their engineer and to be removed if they so required. In 1904 they exhibited notice boards warning persons against removing shell or shingle, and in 1910 they gave a revocable permit to one Humberstone to erect and on payment of a small annual acknowledgment to retain a boat-house on the shore. The land has been regularly visited and supervised by their bailiff, who reported to the Works Committee of the Commissioners any acts done by other persons thereon calculated to endanger or interfere with the wall and works. Having regard to the nature of the tenement I am satisfied that the plaintiffs are and at all material times have been in possession.

On April 14, 1919, one Gould, in consideration of the sum of 45*l.*, purported to convey to the defendant the strip of foreshore in dispute in this action together with the site on which a length of 100 feet of the plaintiffs' new wall has been

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erected, and a small piece of land on the far side of the wall occupied in part by a ditch and other drainage works belonging to the plaintiffs. By the habendum the purchaser is to hold the premises subject to the rights of the plaintiffs and the Thames Conservancy over the sea wall or any other part of the land. According to deeds produced by or on behalf of the defendant, Gould purchased from one Wiggins in 1907 four days after Wiggins had purchased from one Russ, who was a mortgagee from Hester under a mortgage dated in September, 1904. Beyond this no title has been deduced by the defendant, or indeed suggested, and no possession or acts of ownership by or on the part of any predecessor of the defendant were proved, but under colour of the deed of April, 1919, the defendant entered on the land, erected a hut in which he sells tea and other refreshments to visitors in the summer, and recently excavated and removed for sale the sand, shell, and other drift in the manner and to the extent which gave rise to this action. On these facts he bases a claim to be owner in fee of the strip. That claim cannot, in my opinion, succeed. The title, such as it is, disclosed by the deeds is expressly subject to the rights of the plaintiffs and cannot successfully be set up against the title they have established under the statute. The possession of the plaintiffs and of the defendant is at most doubtful or equivocal, and in those circumstances the law attaches it to the title: see *Jones* v. *Chapman* (1) and *Ramsay* v. *Margrett*. (2) The defendant is a trespasser and the plaintiffs are entitled to an injunction to restrain him from excavating or removing any stones, shingle, shell or soil from the strip in question—which must be properly identified—and from otherwise trespassing on the said strip or any part thereof. I do not think it is a case for more than nominal damages, and I award the plaintiffs the sum of 40*s*. under that head. The defendant must pay the costs of the action.

At an early stage of the hearing counsel for the defendant raised the point that the plaintiffs' case amounted in substance to a charge of felony against the defendant, and he applied

(1) 2 Ex. 803. (2) [1894] 2 Q. B. 18, 27.

to have the action stayed until after criminal proceedings had been taken against the defendant, citing *Smith* v. *Selwyn* (1) as sufficient authority for the making of such an order. There are many answers to this application, the most conclusive perhaps being this that the statement of claim, so far from alleging any felonious act on the part of the defendant under s. xxxii. of the Act of 1792 or otherwise, expressly asserts that the defendant has done the acts complained of under a claim of right. In the face of that assertion any prosecution would be an idle and useless proceeding and must inevitably fail.

Solicitors: *Kingsford, Dorman & Co., for Gregsons & Powell, Southend-on-Sea; Engall & Crane.*

G. M.

HALL *v.* MINTER.

[1920. H. 2346.]

Solicitor—Taxation of Costs—Vendor and Purchaser—Specific Performance Action—Compromise of Action—Part purchase Money to be left on Mortgage—Fee for negotiating Loan—Solicitor's Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *s.* 2—*General Remuneration Order,* 1882, *r.* 2.

A contract having been entered into for the sale of a freehold estate for 65,000*l.*, the purchaser refused to complete upon the appointed date, and the vendors commenced an action for specific performance. After considerable negotiations both by correspondence and interviews the action was ultimately compromised upon terms which were in effect that half the purchase money should be left secured upon mortgage of the property for a term of two years, and that the purchaser should pay the balance in cash, together with the plaintiffs' taxed costs of the action, upon the footing of affording them a complete indemnity. Upon the taxation of the costs the purchaser objected to an item of 75*l.* charged as a fee for negotiating the loan of the amount to be left upon mortgage:—

Held, that the charge must be disallowed, as all the negotiations for the settlement of the action were properly charged by items in the bill

(1) [1914] 3 K. B. 98.

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of costs, and it was impossible to sever the terms of negotiation for the settlement of the action, and to make a separate charge for the mortgage.

Stanford v. *Roberts* (1884) 26 Ch. D. 155 distinguished.

SUMMONS TO REVIEW TAXATION.

By an agreement in writing dated December 30, 1919, and made between the plaintiffs Mary Kate Hall and John Lees Casson, as trustees of the will and codicil of Lewis Duval Hall deceased, of the one part and the defendant Frederick George Minter of the other part, the plaintiffs agreed to sell and the defendant to purchase at the price of 65,000*l.*, thirty-six freehold houses known as Nos. 1 to 36 inclusive Mornington Crescent, Hampstead Road, N.W., together with the garden or enclosure containing 2½ acres lying between the Crescent and Hampstead Road and certain other adjoining hereditaments. A deposit of 6000*l.* was paid upon the signing of the contract and the residue of the purchase money was to be paid and the purchase completed on June 24, 1920. By an order made by the London County Council on April 27, 1920, and directed to the defendant, it was ordered that the works and buildings proposed to be constructed by him upon part of Mornington Crescent should be prohibited for the time being, and that such order should remain in force until October 26, 1920.

The defendant having made default in completing the purchase upon the date fixed, the plaintiffs commenced this action for specific performance and damages. After considerable correspondence and negotiations by interviews between the parties the action was settled upon the following terms. The defendant was to pay to the plaintiffs 27,000*l.* in cash, and the balance of 32,000*l.* was to be left on mortgage for a term of two years, at 6 per cent. interest, with power to the defendant to pay off at any time upon giving three months' previous notice, the mortgage to contain a provision that all building developments should be approved by the plaintiffs' surveyors. The defendant was to pay the plaintiffs' costs occasioned by his failure to complete upon the footing of affording them a complete indemnity. By an order made in the action dated April 22, 1921, all proceedings therein

were stayed upon these terms, and it was ordered that plaintiffs' costs be taxed by the taxing Master on the above footing, and that the amount of the taxed costs be paid by the defendant.

The plaintiffs' solicitors brought in a bill of costs for taxation, which included several items dealing with the negotiations for the settlement of the action, and the following item: "Fee as prescribed by Solicitors Remuneration Order for negotiating loan of 32,000*l.*—75*l.*" The defendant objected to this item on the following grounds (inter alia): (*a*) That it was a term of settlement of litigation; . . . . (*c*) that the plaintiffs' solicitors did not ask for the fee or make it a term that it should be paid; (*d*) that had the mortgage been stipulated for in the contract, the fee could not have been charged; (*e*) that the terms of settlement could not be severed; (*f*) that the charges in relation to the settlement of the terms including the arrangement of the mortgage had been already charged and allowed in the bill.

The taxing Master was of opinion that the Solicitors Remuneration Act, 1881, and the orders thereunder allowed a mortgagee's solicitors to charge a negotiating fee under certain circumstances and that the present case came within those circumstances as he thought the terms of settlement could be severed. He came to the conclusion that the solicitors for the mortgagees did negotiate the loan of 32,000*l.* and that the prescribed fee of 75*l.* had been earned by them. He therefore disallowed the objections. The defendant then took out this summons to review the taxation by disallowing the fee.

By s. 2 of the Solicitors Remuneration Act, 1881, it is provided that the Lord Chancellor, the Lord Chief Justice and other persons named therein "may from time to time make any such general order as to them seems fit for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing, and in respect of other business not being business in any action, or transacted in any Court, or in the chambers of

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any judge or master, and not being otherwise contentious business, and may revoke or alter any such Order."

By the General Order made in 1882, and known as the Remuneration Order, it is provided by s. 2: Subject to the exception aforesaid, the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action, or transacted in any Court, or in the chambers of any judge or master is to be regulated as follows—namely, (*a*) In respect of sales, purchases and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor or mortgagee, is to be that prescribed in Part I. of Sch. 1 of this Order, and to be subject to the regulations therein contained.

SCHEDULE I.

PART I.

Scale of charges on Sales, Purchases and Mortgages, and Rules applicable thereto.

SCALE.

	(1) For the 1st 1000*l.*	(2) For the 2nd and 3rd 1000*l.*	(3) For the 4th and each subsequent 1000*l.* up to 10,000*l.*	(4) For each subsequent 1000*l.* up to 100,000*l.*
	per 100*l.*	per 100*l.*	per 100*l.*	per 100*l.*
	s. *d.*	*s.* *d.*	*s.* *d.*	*s.* *d.*
Mortgagee's solicitor for negotiating loan.	20 0	20 0	5 0	2 6

A. Grant K.C. and *Tyrrell* for the defendant. The charge is sought to be justified under r. 2 of the General Order of 1882 made under the Solicitors Remuneration Act, 1881, but the question is whether that Order applies at all. The rule excepts "business in any action, or transacted in any Court, or in the chambers of any Judge or Master." The business here

was the settlement of an action. But even if it applies all the correspondence, interviews and other details concerning the settlement of the action are properly charged for under Sch. II. of the Order. The negotiations were largely concerned with the terms on which the proposed mortgage should be given, its amount, the interest payable, and the period for which it should not be called in. The negotiating fee is charged for doing work that was otherwise already charged for. The plaintiffs' solicitors could not charge this fee to their own clients.

It is possible to charge a scale fee in an action. In *Stanford* v. *Roberts* (1) it was held that on the true construction of s. 2 of the Solicitors Remuneration Act, 1881, conveyancing costs in an action could be charged for. The exception is of "other business, not being business in any action, or transacted in any court or in the chambers of any judge or master and not being otherwise contentious business."

The judgment in that case however deals only with its subject matter—namely, the costs of deeds settled in the course of an administration action. It has no application to the present case, which is not within the Act at all. This is a charge made for purely contentious business.

Dighton Pollock for the plaintiffs. The charge comes within the schedule to the Solicitors Remuneration Order, 1882, and ought to be allowed. This was a mortgage de novo entirely for the benefit of the purchaser. What the vendors wanted was completion and payment, but the purchaser introduced this new term, which was not part of the original contract. The vendors get less than their strict rights; they might have rescinded and resold. Contentious business includes actions of every kind. "Action" is not limited to administration actions: *Stanford* v. *Roberts*. (1) The decision in that case was confirmed in *In re Merchant Taylors Co.* (2) The transaction is really a new bargain between the parties.

[SARGANT J. It is practically deferring completion for two years, and taking a mortgage instead of a lien.]

(1) 26 Ch. D. 155. (2) (1885) 30 Ch. D. 28.

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The plaintiffs would be willing to give up some portion of the item charges for conferences, provided that they could keep the negotiation fee.

SARGANT J. This is an application to review a taxation of costs under an order in an action for specific performance of an agreement to sell in a place known as Mornington Crescent, Hampstead Road, London, some houses and a garden in front of the houses. The purchase money was a large sum, 65,000*l.*; 6000*l.* was paid by the vendor as a deposit upon signing the contract and the purchase was to be completed on June 24, 1920. The vendors were the plaintiffs Mrs. Hall and Mr. Casson and the purchaser was the defendant Mr. Minter. The purchase price was not paid on the date fixed for completion, and after considerable delay on August 7, 1920, a writ was issued by the plaintiffs in an ordinary vendor's action for specific performance. The statement of claim was delivered on November 4, 1920. Negotiations then took place between the plaintiffs and the defendant for some adjustment or compromise of the respective rights of the parties; and it is pretty clear that the position of the plaintiffs was an extremely strong one. They were entitled, if the action had gone to trial, to an order for payment of the 59,000*l.*, which was the balance of the purchase money, with a declaration of lien and the working out of the lien by way of foreclosure; but they entered into a discussion with the purchaser as to whether he could not give them something that would reasonably satisfy them, something less than their strict legal rights; and ultimately, as a result of negotiations that took place between the parties and their solicitors, a very reasonable arrangement was arrived at. According to the final letter of January 19, 1921, which is a letter from the vendors' solicitors to the purchaser's solicitor, the terms were to be as follows. First, 27,000*l.* was to be paid by January 21, which would leave a sum of 32,000*l.* still payable. Secondly, 32,000*l.* was to be left on mortgage for a term of two years at 6 per cent. interest, with power to the mortgagor to pay off at any earlier date

upon giving three months' previous notice. Thirdly, the mortgage was to contain a provision that no work in the way of building development or otherwise was to take place except subject to the reasonable approval of the vendors' surveyors. Fourthly, the completion was to be as on June 24, 1920—that was the date originally fixed by the agreement of purchase—the defendant paying 6 per cent. interest on the 65,000*l.* purchase money, and taking the rents and interest earned by the 6000*l.* while on deposit. Then fifthly, the purchaser was to pay the costs of the vendors' solicitors occasioned by the failure to complete on the footing of affording a complete indemnity to the vendors. So that the solicitors would get considerably more than solicitor and client costs—they were to have a complete indemnity in the matter of costs, and as to costs the order is as follows: "And it is ordered that the costs of the plaintiffs occasioned by the failure of the defendant to complete the purchase on the 24th June, 1920, of the premises comprised in the agreement the subject of this action be taxed by the taxing Master on the footing of affording to the plaintiffs a complete indemnity."

When the bill of costs was brought in there were a considerable number of items from January 6, 1921, onwards, relating to the negotiations which had taken place between the vendors and the purchaser, and including attendances on the vendors themselves, and generally including all the costs which had been incurred by the vendors' solicitors for the purpose of arriving at the terms of settlement ultimately embodied in the letter I have read of January 19. It is quite clear that between January 6 and January 28, the whole costs of the vendors of the negotiations were charged for in the bill; and it is also clear from the entries in the bill of costs and from the correspondence that passed between the vendors' solicitors and the purchaser's solicitor, that an important part of the terms of settlement ultimately arrived at was concerned with the conditions of the mortgage in question. For instance, there was a discussion whether the mortgage should be for three or five years; a discussion as to the rate of interest on the mortgage—7 per cent. was

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suggested at one time; and a discussion as to whether the mortgagees were to be entitled to prevent building developments being carried out without their consent and as to the amount of control that was to be left to the mortgagor. There were other terms also, but there is no doubt whatever, to my mind, that a very important part of the terms of settlement was the position of the vendors under this mortgage; and when January 28 had arrived, it seems to me that the whole terms of settlement had been agreed on including the terms of the mortgage which was to secure the balance of the purchase money.

Well, those charges having been made, on February 1 this charge is put in—it is as prescribed by the Solicitors Remuneration Order: "For negotiating loan of 32,000*l.*—75*l.*," and the question here is whether this was, within the meaning of the Solicitors Remuneration Act, a negotiation for the mortgage in addition to the negotiation for the terms of compromise which are fully provided for by the terms of this Order. Or to put it in another way: Were the vendors' solicitors entitled to charge their client not only for negotiating the terms of compromise but also for negotiating the mortgage for 32,000*l.*? If they were, this charge is a proper charge, because the arrangement was that the defendant was to indemnify the plaintiffs. If the charge could not be made against the plaintiffs, then the fee is not allowable in the bill, because it is not something against which the defendant has to indemnify the plaintiffs.

Of course I accept the decision of Kay J. in *Stanford* v. *Roberts* (1) as to this business, if it was actually done, if there was a true negotiation, not being exempted from the Order and the Act by reason of its being incidental to an action. But it seems to me that it is impossible to separate the terms of negotiation for the compromise of this action, and to say that there was outside and apart from those terms a separate negotiation for a mortgage. The position, as I have said, of the parties was this, that the plaintiffs were

(1) 26 Ch. D. 155; approved in C. A., *In re Merchant Taylors' Co.*, 30 Ch. D. 28.

entitled to enforce a lien for 59,000*l.* practically immediately. And, this being so, the parties came together and agreed, that the position of the plaintiffs and of the defendant should be altered, and that these terms of compromise should be carried out. That negotiation for the terms of compromise and the ultimate settlement that was arrived at seem to me to have been exhaustive and to leave nothing further for negotiation at all; and, therefore, I think that there was no separate negotiation for the mortgage which could properly be charged for under the Solicitors Remuneration Act, 1881. The mortgage was involved in the terms of compromise in respect of which detailed charges have been made and quite properly made in the bill of costs.

No doubt as regards the carrying out of the mere conveyancing part of the mortgage, the solicitors for the vendors are entitled to charge, and they have charged in the ordinary way. They have not as a matter of fact purported to charge Scale B, no doubt because they have not investigated the title, as it was the title of their clients, the vendors. They have made detailed charges in respect of the work of drafting the mortgage and so on: therefore, they do not go unremunerated in that respect nor of course for their trouble in respect of negotiating a compromise of the rights of the parties in the action. All I decide is that, having negotiated that compromise, they are not entitled to charge a separate negotiation fee as in respect of a separate negotiation for a mortgage. For, in my view, there was no such separate negotiation, and the terms of the mortgage were entirely involved in the negotiation already effected for the compromise of the rights in the action.

In my opinion, therefore, this charge ought to be disallowed, the purchaser to have the costs of the application.

Solicitor for defendant: *H. W. Clarkson.*

Solicitors for plaintiffs: *Chester, Broome & Griffithes.*

H. L. L.

SARGANT J.

1921

Feb. 23; *March* 16.

WAKEFIELD *v.* WHITEAWAY, LAIDLAW AND COMPANY. (1)

[1921. W. 160.]

Revenue—Income Tax—Dominion Income Tax—Company—Preference Shareholders—Fixed Dividend—Benefit of Relief—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 55, 237—*Rule* 20 *of General Rules under Income Tax Act,* 1918—*Finance Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27, *sub-s.* 5; *s.* 64.

By r. 20 of the General Rules under the Income Tax Act, 1918, companies charged with income tax on their profits are allowed to deduct from dividends made in respect of any share, right or title thereto the income tax "appropriate thereto." That rule was modified by sub-s. 5 of s. 27 of the Finance Act, 1920—a sub-section which was absent from the corresponding s. 55 of the Income Tax Act, 1918—the effect of that modification being that a company so deducting the tax under r. 20, is prohibited from deducting the tax from any dividend at a rate exceeding the rate of the United Kingdom tax as reduced by any relief from that tax given to the company under s. 27 of the Finance Act, 1920, in respect of any payment of Dominion income tax.

A company incorporated under the Companies Acts and carrying on business in the United Kingdom and the Colonies claimed the right to deduct from the dividends of the preference shareholders income tax at the full rate, without granting relief from that tax corresponding with that to which the company was entitled under s. 27 aforesaid in respect of Dominion income tax:—

Held, that the provisions of sub-s. 5 of s. 27 of the Finance Act, 1920, did not, notwithstanding the apparent generality of the language of that sub-section, entitle the preference shareholders to payment of their dividends without deduction of income tax therefrom at a rate exceeding the United Kingdom income tax as reduced by the relief from that tax conferred upon the company under s. 27 of the Finance Act, 1920, in respect of any payment by the company of Dominion income tax; and that, accordingly, the company were entitled to deduct from those dividends the full rate of United Kingdom income tax.

The decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* [1921] 1 A. C. 172 is not affected by sub-s. 5 of s. 27 of the Finance Act, 1920.

MOTION.

Whiteaway, Laidlaw & Co., Ld., a company incorporated in May, 1908, under the Companies Acts, carried on the business of East India and colonial merchants in London and

(1) Publication unavoidably delayed, the late Mr. Frank Evans, who was the reporter present in Court, not having completed his report.—F. P.

the Far East. The capital of the company, which originally was 600,000*l.* divided into 400,000 6 per cent. preference shares of 1*l.* each and 200,000 ordinary shares of 1*l.* each, was from time to time increased and on June 23, 1919, was further increased by the creation of 500,000 7 per cent. "A" cumulative preference shares of 1*l.* each, to rank, as regards dividend, and in a winding up, as regards repayment of capital, in priority to the ordinary shares, and after the 6 per cent. preference shares. Of that authorized issue of 7 per cent. preference shares, 250,000 shares were offered for public subscription by a prospectus dated June 23, 1919, in which it was expressly stated that the dividend on such shares would be "subject to the deduction of income tax at the full rate for the time being payable in respect of profits earned in the United Kingdom."

Relying on the terms of that prospectus the plaintiff Richard Henry Wakefield subscribed for and became the registered proprietor of 500 of the 7 per cent. preference shares.

For each of the half years ending June 30 and December 31, 1920, respectively, income tax at the full rate of 6*s.* in the £ was deducted by the company from the dividends which were paid to the 7 per cent. preference shareholders, including the plaintiff, notwithstanding that the company was entitled under s. 27 of the Finance Act, 1920, to receive relief in respect of Dominion income tax for the period from April 5, 1920, approximately estimated at from 2*s.* 6*d.* to 3*s.* in the £ on the amount of the assessable profits of the company for the year ending April 5, 1921.

The plaintiff commenced this action in which he claimed (1.) a declaration that he was entitled to receive the fixed cumulative preferential dividend on his shares without deduction of income tax therefrom at a rate exceeding the United Kingdom income tax, as reduced by the relief from that tax given to the company under s. 27 of the Finance Act, 1920, in respect of any payment by the company of Dominion income tax, (2.) an injunction, and (3.) payment to the plaintiff of the amount deducted by the company in respect of income tax from the dividends on his said shares for the

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half year ended December 31, 1920, in excess of the United Kingdom income tax as reduced by the relief aforesaid.

This was an interlocutory application (which by consent was treated as the trial of the action) for an injunction to restrain the company until the trial from deducting income tax from the dividends on the plaintiff's preference shares at a rate exceeding the United Kingdom income tax, as reduced by the relief from that tax given to the company by s. 27 of the Finance Act, 1920.

A. Grant K.C. and *C. W. Turner* for the plaintiff. The effect of sub-s. 5 of s. 27 of the Finance Act, 1920 (1), is to give the preference as well as the ordinary shareholders the benefit of the relief in respect of Dominion income tax conferred by s. 27 of that Act. The sub-section is an addition to r. 20 of the General Rules under the Income Tax Act, 1918 (2), and by s. 64 of the Finance Act, 1920, Part II., which deals with income tax, is to be construed together with the Income Tax Acts. "Body of persons" referred to in sub-s. 5 of s. 27 of the Finance Act, 1920, and in r. 20 is defined by s. 237 of the Income Tax Act, 1918, and includes "any company . . . whether corporate or not corporate."

It is the company that has to pay the tax; and having paid it, it is the company's duty to make the deduction from the dividends of all its shareholders. The language of the sub-section is wide enough to include the preference as well as the ordinary shareholders of the company; both classes are treated as members of a body of persons sharing profits in a

(1) Finance Act, 1920, s. 27, sub-s. 5: "Where under Rule 20 of the General Rules applicable to Schedules A, B, C, D & E a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax."

(2) Rule 20 of the General Rules, 1918: "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

particular proportion. The general language of the sub-section shows that it was the intention of the Legislature to override the effect of the decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) and to restore the decision in *Rover* v. *South African Breweries.* (2) That such was the intention of the Legislature is corroborated by the date at which the Finance Act, 1920, received the Royal assent, on August 4, 1920, a few days after the decision in the *Scottish Case* ; and at the time of the introduction of and debate on the Bill for that Act, the English and Scottish Courts were disagreed.

[It was further argued that the Act of 1920 had the effect of overriding the pre-existing contract contained in the prospectus.]

Galbraith K.C. and *D. D. Robertson* for the defendant company. The language of sub-s. 5 of s. 27 of the Finance Act, 1920, is too general and indefinite to have the effect of overriding the decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) and restoring the decision in *Rover* v. *South African Breweries.* (2) If that had been the intention of the Legislature, more precise language would have been necessary to give effect to such intention. The sub-section was intended to give relief to those shareholders only—that is, the ordinary shareholders—who were subject to the double tax. The only object of the sub-section was to modify r. 20 of the General Rules under the Income Tax Act, 1918, under which, in the absence of such modification, the ordinary shareholders would have been liable to have the full rate of the English tax deducted from their dividends.

Cur. adv. vult.

March 16. SARGANT J. The question in dispute in this action, or, at any rate, the arguments before me can hardly be appreciated without a statement of the result of certain previous decisions in proceedings between other parties with regard to a similar subject-matter. In *Rover* v. *South African*

(1) [1921] 1 A. C. 172. (2) [1918] 2 Ch. 233.

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Breweries (1) Astbury J. held that, where under s. 43 of the Finance Act, 1916, an English company had obtained relief from some part of their English income tax by reason of the payment of Colonial income tax, the holders of preference shares in the company were entitled to recover a corresponding relief in respect of the dividends on their preference shares. About the same time a contrary decision was come to in the Scottish Courts ; and on an appeal from that decision to the House of Lords, the view of the Scottish Courts was upheld and the decision of Astbury J. was in terms overruled : *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (2)

In the meantime, that is to say, shortly after the decision in *Rover* v. *South African Breweries* (1), the defendant company had made a new issue of 500,000 "A" cumulative preference shares ; and, no doubt, for the purpose of excluding the effect of the decision in the last-mentioned action, had provided that "the said new shares shall carry a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital for the time being paid up thereon, subject to the deduction of income tax at the full rate for the time being payable in respect of profits earned in the United Kingdom." Later on, that is to say, on July 22, 1920, the final decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (2) was pronounced ; and a few days afterwards—namely, on August 4, 1920—the Royal assent was given to the Finance Act, 1920, which effected some changes in the law with regard to income tax, and in particular repeated s. 55 of the Income Tax Act, 1918, which had itself replaced s. 43 of the Finance Act, 1916, and substituted the somewhat different provisions which are contained in s. 27 of the Act of 1920.

The plaintiff contends that the result of this new legislation is to override the decision in the *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (2) and to restore the decision in *Rover* v. *South African Breweries.* (1) The defendant company deny this result,

(1) [1918] 2 Ch. 233. (2) [1921] 1 A. C. 172.

and further contend that, even if this be so, as a general rule, yet on the true construction of the Act of 1920, it cannot have such a retrospective operation as to override and annul the direct contract to the contrary which has been made in this particular case.

The questions raised by these two contentions are obviously of very different degrees of importance. The first contention raises a question applying to the whole of the large class of Colonial companies registered in this country that have issued preference shares. The second contention affects only that much more limited class of those companies that have issued, or may desire to issue, preference shares which shall be expressly liable to have income tax deducted from their dividends at the full United Kingdom rate; and there is no occasion to deal with the second contention unless the first contention is successful.

The argument for the plaintiff rests mainly on the introduction into s. 27 of the Finance Act, 1920, of a new sub-section 5, whereby it is provided: [His Lordship then read the sub-section in question, and r. 20, therein referred to, and proceeded:] The argument for the plaintiff, as I understand it, is this: Rule 20 enables the deduction of income tax from dividends at the same rate as companies have to pay income tax on their profits, and is indeed the only authority for such deduction. Sub-s. 5 prevents any greater deduction from dividends than one at the United Kingdom rate, less any relief in respect of Dominion income tax. This and other similar companies obtain a relief from United Kingdom income tax in respect of Dominion income tax—ergo, the company are bound to allow an equivalent relief when they come to deduct income tax on their preference shares.

This interpretation of sub-s. 5 is said to be corroborated by a consideration of the date at which the Finance Act, 1920, was passed, or was being debated, or was introduced. It was passed into law by receiving the Royal assent on August 4, 1920—that is, some thirteen days after the date of the delivery of the judgment of the House of Lords in

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Scottish Union and National Insurance Co. v. *New Zealand and Australian Land Co.* (1) And the Bill for the Act is said to have been introduced or debated a considerable time before the delivery of this judgment, and at a date when the difference of view between the English Courts and the Scottish Courts still remained undetermined. It is argued therefore that the dates clearly indicate that sub-s. 5 either was enacted for the purpose of curing the mischief inherent in the final decision of the House of Lords in the case last mentioned or was introduced for the purpose of setting at rest the conflict between the English and Scottish Courts by preferring the view of the English Courts.

In my judgment, this argument is fallacious from first to last. The fallacy is analogous to one that is often met with in the interpretation of wills. It starts with a knowledge of certain difficulties arising from decided cases ; it then assumes that the language in question has to be read in connection with those special difficulties, and not in its ordinary prima facie sense, and in the result a conclusion is often arrived at which could never have been reached by a mere consideration of the words used, and is in the highest degree elaborate and far-fetched. But as the argument was pressed on me with such persistence and with some ingenuity, I will analyse it in greater detail than might otherwise have been the case.

In the first place, if the date at which the Finance Act, 1920, should be regarded is August 4, 1920, as I think it is, I cannot agree that there was any mischief to be cured. All conflict between the Courts of the two countries had been set at rest, and that by a decision which, in my judgment, so far from conflicting with the business point of view, or creating any practical anomaly, tended entirely in the opposite direction. The business result of *Rover* v. *South African Breweries* (2) was obviously an unexpected and unfortunate one, as indeed is clearly indicated by the special terms on which the issue of the preference shares now in question was made ; and all this had been put right by the final decision in *Scottish Union and National Insurance Co.* v. *New Zealand*

(1) [1921] 1 A. C. 172. (2) [1918] 2 Ch. 233.

and Australian Land Co. (1) As far as this is concerned, the whole probabilities of the case seem to me against any desire on the part of the Legislature to re-establish the state of things involved in the decision in *Rover* v. *South African Breweries.* (2)

If however the crucial date is not the passing of the Finance Act, 1920, but the introduction of the Bill for the Act or of this particular sub-section, or the debate on the Bill on this sub-section or even, as counsel for the plaintiff at one time suggested, the date of the opening of the Session of Parliament in which the legislation was passed, then I am in some little difficulty. For, although I appealed to counsel for the plaintiff several times to name a particular date for any one of these occurrences on which he relied, no such date was ever mentioned, still less proved, and of course it was for the plaintiff to prove his case on this point. But, indeed, whatever the date during the session in question, little difference could be made. Having regard to the time ordinarily occupied in such cases, the appeal in the *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) must almost certainly have been presented before, or almost immediately after, the opening of the Session in question. It seems highly improbable that, pending the ascertainment of the law by the highest tribunal, legislation should have been introduced for the alteration of the law on the very point still awaiting decision.

Further, if the Legislature had desired to make such an alteration as is suggested, it is hardly likely that this would be done by such general words as those in sub-s. 5. Legislation to meet a particular decision is, as a rule, framed in much more specific and restricted language, as, for instance, was the case with the legislation—namely, s. 57 of the Finance (1909–10) Act, 1910—which was passed to meet the decision in *Attorney-General* v. *Duke of Richmond.* (3) Here it would have been quite easy to enact that where a company carrying on business in a colony had paid income tax on the profits

(1) [1921] 1 A. C. 172. (2) [1918] 2 Ch. 233.
(3) [1909] A. C. 466.

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of its business there, and was in consequence entitled to an abatement of income tax here, it should allow a corresponding relief in respect of the income tax deductible from the dividends payable on its shares, whether preferential or ordinary, and notwithstanding any contract, past or future, to the contrary. Such a provision would have recognized, as would seem to be essential for the purpose, the distinction between income tax on the profits of the company and income tax on the dividends paid to the shareholders or to any class of shareholders. But, in fact, the language of sub-s. 5 does not in any way recognize this distinction, and indeed modifies a rule or case in the earlier legislation, which again is not occupied with any such distinction. And the vagueness and want of precision of this language is the less explicable, on the plaintiff's view of the intention, because the general language of s. 43 of the Finance Act, 1916, on which the decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) mainly turned, is almost precisely repeated in sub-s. 1 of s. 27 of the Finance Act, 1920. If the plaintiff's view is correct, one would expect either that an alteration would have been made in the general language of the corresponding section of the later Act, or that, if the general language had been preserved, any subsequent alteration would have been worded in language which was clear and definite and was limited to the particular object aimed at. Indeed, as the argument progressed, it became clear that such strength as the plaintiff's case had lay in the assertion or suggestion that, large and general as the words of sub-s. 5 appear to be, such a case as *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) is the only one to which they can possibly apply; and that effect must be given to them accordingly in relation to that particular class of case. Here again it was for the plaintiff to make out his case, and I do not think he has done so. Indeed, when once the language of sub-s. 5 is regarded simply in relation to r. 20, and all pre-conceived notions are discarded of any intention of the Legislature to

(1) [1921] 1 A. C. 172.

deal specially or exclusively with the class of cases of which *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) is an example, there appears to be little, if any, difficulty in grasping the true object of sub-s. 5.

The latter part of r. 20 of the General Rules allows companies charged with income tax on their profits to deduct from the dividends payable to their shareholders, whether preference or ordinary—although it is necessarily with regard to the preference shareholders that the privilege is of value—the income tax appropriate thereto. The rate of this tax will ordinarily, although not necessarily, be the same as that which has been charged on profits ; but, even then, the total amount so deducted by any company may be markedly different from the total amount paid by that company in respect of profits. A portion only of the profits may have been distributed by way of dividends, or, the dividend on the ordinary shares may have been declared free of income tax. In any case this part of the rule—which is, be it observed, permissive and not compulsory—does not operate in any way as between a company and the Revenue, but functions solely as between a company and its shareholders.

Now, when relief is given against double income tax, as was first done by s. 43 of the Finance Act, 1916, and as is now done more minutely and scientifically by the Finance Act, 1920, it becomes clear that if such relief is to be completely effective, it must not be confined to persons and companies directly chargeable to the Revenue in respect of their income or profits, as may have been done by s. 43 of the Finance Act, 1916, as followed by sub-s. 1 of s. 27 of the Finance Act, 1920. Relief must also be granted to those recipients of dividends who, having already been charged with Colonial income tax, are about to contribute English income tax indirectly by means of a deduction of tax in this country from their dividends. Take, as a simple instance, a company incorporated and carrying on business in an Australian colony—although the same reasoning would probably apply to an English company

(1) [1921] 1 A. C. 172.

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carrying on business there—and assume that the company has a number of English shareholders, whose dividends are distributed here through an English office or English agents who are put in funds for that purpose by remittances from Australia. Then, if the Australian law as to income tax is analogous to the English law, the company will pay income tax on its profits, and will be entitled to deduct income tax at the appropriate colonial rate on all dividends payable to its shareholders, including those here; and the remittances made to the English office will be subject to this deduction. But when the English office comes to distribute these dividends, they have to provide for and deduct English income tax; and under r. 20 of the Act of 1918, if unmodified, this deduction would be of the tax "appropriate thereto," which would prima facie be tax at the full English rate. The words of sub-s. 5 obviously apply to such a case, and prevent the deduction here being at any rate exceeding the English or United Kingdom rate, as reduced by any relief from that tax given under the other parts of s. 27; and in the result, the subject being English, income tax by way of deduction from dividend is placed in the same position as the subject who is directly chargeable.

In my judgment, such a case as that I have mentioned forms proper subject-matter for the operation of sub-s. 5, and is a sufficient explanation of the intention of that sub-section in s. 27, although there may well be other cases to which the sub-section also applies. I see no reason for attributing the enactment of sub-s. 5 to a desire on the part of the Legislature to overrule or modify a legal decision which appears to me a satisfactory one from every standpoint.

It is not suggested that the preference shareholders have suffered any deduction from their dividends in respect of Colonial income tax; and accordingly they have no right to claim relief from the deduction of United Kingdom income tax at the full rate of 6*s.* in the £.

On the view above stated, it is unnecessary to consider whether the terms of s. 27, sub-s. 5, of the Finance Act, 1920, are sufficiently strong to overrule existing contracts to the

contrary; and I think it better to leave that question altogether alone.

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The motion being by agreement treated as the trial of the action, the actual order will be for the dismissal of the action.

Solicitors for both parties: *Kimber Bull, Howland, Clappé & Co.*

H. C. H.

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Nov. 3, 7, 8, 17.

[1920. A. 627.]

Electric Lighting—Municipal Corporation—Statutory Powers—Electrical Undertaking vested in Corporation—Fittings—Power to sell—Electricity (Supply) Act, 1919 (9 & 10 *Geo.* 5, *c.* 100), *s.* 23—*Liverpool Electric Supply (Transfer) Act*, 1896 (59 & 60 *Vict. c. xii.*)—*Liverpool Tramways and Electric Supply (Garston Transfer) Act*, 1902 (2 *Edw.* 7, *c. ccxvi.*).

The Electricity (Supply) Act, 1919, s. 23, sub-s. 1, provides that any local authority authorized by special Act or Order to supply electricity "may provide, let for hire, and in respect thereof may connect, repair, maintain and remove (but shall not, unless expressly authorised to do so by the special Act or order, manufacture or sell) electric lines, fittings, apparatus and appliances for lighting, heating and motive power and for all other purposes for which electricity can or may be used":—

Held, that the section is not operative to close down existing businesses, or otherwise to deprive local authorities of powers granted to them undoubtedly, though not necessarily, in express terms in special Acts or Orders.

A corporation purchased an electrical undertaking, which included a fittings department, and by the special Act the whole of the undertaking was vested in the corporation. On taking over the undertaking the corporation continued the business of supplying electrical fittings for the use of consumers. In an action asking for a declaration that the Corporation had no power to restrain them from carrying on such business.

Held, that the whole of the undertaking being vested in the corporation by their special Act, they were entitled to carry on the business as it existed at the date of the purchase.

ACTION.

The defendants were a municipal corporation subject to the Municipal Corporations Act, 1882, and were the local

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authority for the purposes of the Electric Lighting Acts, 1882 and 1888, for the City of Liverpool.

The action was by the Attorney-General at the relation of certain ratepayers of the City of Liverpool, and he claimed (1.) a declaration that the defendants had no power to carry on the trade or business of providing, selling, supplying, erecting, installing, altering and/or repairing electric light fittings and wires in houses and other buildings, or any part of such trade or business, either within or without the City of Liverpool; (2.) a declaration that the defendants had no power to expend or use in carrying on such trades or businesses or any part of them, any of the capital moneys borrowed for the purposes of their electric undertaking or of the receipts of the said undertaking or of the proceeds of any rates levied by them or moneys forming part of their city fund, or to use for the purposes of such trades or businesses or any part of them any plant, premises, property or servants required or employed by the defendants for the purposes of their said electric undertaking or for other authorized purposes; and (3.) an injunction restraining the defendants from carrying on the said trade or business, or expending or using for the purposes thereof any of the said money, plant, premises, property or servants. By para. 10 of the statement of claim the plaintiff alleged that the defendants were carrying on the business complained of, and also that they were carrying on such business in connection with houses and/or other buildings within the City of Liverpool to which they were neither supplying nor about to supply electricity. The evidence in support of the allegation that the defendants were carrying on the business in relation to houses and buildings without their area broke down at the trial, and the allegation was withdrawn. No evidence was given in support of the allegation that the defendants were carrying on the business in connection with houses or buildings to which they were neither supplying nor about to supply electricity.

The defendants by their defence pleaded that they had been incorporated and constituted a corporation by divers

Royal Charters, and they claimed to be a common law corporation with all the powers of such a corporation, subject only to any such limitations as to the use of their funds contained in the Municipal Corporations Act, 1882.

The Liverpool Electric Supply Co., Ld. (hereinafter referred to as the Liverpool Company), was registered in the year 1891 under the Companies Acts, 1862 to 1890, with the following objects (among others) as stated in clause 3 of the memorandum of association:—

"(1.) To light thoroughfares, streets, public places, public or private buildings, manufactories, mines, houses, ships, railways, tramways or any other places or things by means of electricity or other similar agency, or to enable the same so to be lighted;

"(2.) To create and produce electricity or other similar agency, and to supply the same for the production or transmission of power for lighting purposes or otherwise as may be thought advisable;

"(3.) To manufacture, hire, let, license, repair or sell all necessary machinery, apparatus, materials or things for any of the before mentioned purposes in the district aforesaid."

By virtue of the Electric Lighting Acts, 1882 and 1888, the Liverpool Electric Lighting Order, 1891, the Toxteth Park Electric Lighting Order, 1891, and the Liverpool Electric Lighting Order, 1892, the Liverpool company had been authorized to supply, and did in fact supply, electrical energy in the area defined in those Orders down to the year 1896. In addition to this statutory undertaking the Liverpool company carried on an extensive electrical fittings department. They manufactured and sold all sorts of electrical fittings, and they had a showroom for the display of their wares. They traded both within and without the City of Liverpool. They entered into maintenance contracts. The Liverpool Order of 1892 contained a special provision (art. 7) conferring power on the Corporation of Liverpool to purchase and acquire the Liverpool company's statutory undertaking, severed from any other undertaking or business of the Liverpool company with all powers, rights, authorities and

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privileges of the Liverpool company enjoyed by them for or as part of or in connection with such undertaking. The acquisition contemplated by that Order was confined in explicit terms to the statutory undertaking of the Liverpool company.

On May 21, 1896, was passed the Liverpool Electric Supply (Transfer) Act, 1896. That statute enacted that the Liverpool company should sell and the Liverpool Corporation should purchase, with certain specified exceptions, the whole of the undertaking and other works of the Liverpool company, and all their property and assets, real and personal, with all their rights, powers and privileges as the same should stand at the date of the completion of the purchase. The property so to be sold was defined in the Act as "the undertaking," and was not limited to the statutory undertaking. The specified exceptions consisted of the Liverpool company's reserve and renewal fund, and their minutes. The recitals in the Transfer Act of 1896 included a recital of the Liverpool Order, 1892, and a reference to the sale and terms of purchase authorized by that Order. Sect. 4 of the Act provided that as from the completion of the purchase all the powers, duties and obligations of the company in relation to the supply of energy under the Electric Lighting Acts, 1882 and 1888, and the recited Orders should be transferred to and vested in the corporation. Sect. 5 provided that the corporation should be liable to and should pay and discharge all the debts and liabilities of every kind of the company existing at the date of completion of the purchase, including liabilities in respect of causes of action then existing and arising in connection with the carrying on of their undertaking in the usual course of business, and as from the date aforesaid the company should not be liable for the same and the corporation should be entitled to all debts and sums of money then owing to the company, except the reserve and renewal fund, and the corporation should have the same powers for recovering any such debts and sums of money as the company would have had if the transfer had not been made. Sect. 6 provided that all purchases, sales, conveyances,

deeds, contracts and agreements entered into or made by the company and in force at the date of completion of the purchase should be as binding and of as full force and effect in every respect against or in favour of the corporation and might be enforced as fully and effectually as if instead of the company the corporation had been a party thereto. By s. 7 it was provided that pending actions between the company and its customers should not abate but would continue as between the corporation and the customers. Sect. 8 was in the following terms: "(1.) As from January 1, 1895, the Company shall be deemed to have carried on their undertaking for the benefit and at the risk of the Corporation, and to have been authorised by them to make all such expenditure and incur all such liabilities on capital account and to borrow all such moneys in respect thereof as the Company have deemed necessary for the reasonable extension of their business in order to enable them to carry out their statutory obligations or otherwise in the proper conduct of the business of the Company. (2.) Until the completion of the purchase the Company shall retain their present control and management of their undertaking, and shall carry on and manage the same in the ordinary and regular course of business for the benefit and at the risk of the Corporation, ... and shall also continue to keep proper accounts, and may expend on capital account such sums and incur such liabilities as they think necessary for the reasonable extension of their business in order to enable them to carry out their statutory obligations or otherwise in the proper conduct of the business of the Company, and may from time to time borrow such sums as may be necessary for the purposes aforesaid, but shall not make any other expenditure on capital account, except at the request of the Corporation." Under s. 10 the corporation were bound to take over all the company's servants on the same terms as to position and emoluments as governed their employment by the company. Sect. 13 provided that after completion of the purchase the company were not to carry on business on their own account, and s. 17 provided for the speedy dissolution of the company.

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By the Liverpool Electric Lighting Order, 1896, it was provided (by art. 3) that the Order should come into force on the completion of the transfer of the undertakings and assets of the Liverpool company to the Corporation of Liverpool, or on the passing of an Act confirming that Order, whichever of those should last happen. The Order duly came into force, and by it the Corporation of Liverpool was constituted the statutory authority for the supply of electrical energy, the area of supply being defined as the City of Liverpool as the same was constituted at the commencement of the Order. Art. 54 of the Order provided for the application of the moneys received by them in respect of the undertaking, the net surplus remaining in any year being carried to the local rate as therein mentioned. By art. 76 the Liverpool Orders of 1891 and 1892, and the Toxteth Park Order of 1891 were repealed.

The Garston and District Electric Supply Co., Ld. (hereinafter called the Garston Company), was registered in 1899 under the Companies Acts, 1862 to 1898, with the following objects (amongst others) as stated in clause 3 of their memorandum of association :—

"(1.) To carry on the business of an electric light company in all its branches, and, in particular, to construct, lay down, establish, fix and carry out all necessary cables, wires, lines, accumulators, lamps and works, and to generate, accumulate, distribute and supply electricity, and to light towns, streets, markets, theatres, shops, houses, buildings and places, both public and private, and also to carry on the business of electricians, suppliers of electricity for the purposes of light, heat, motive power or otherwise, and manufacturers of and dealers in all apparatus and things required for or capable of being used in connection with the generation, supply, accumulation and employment of electricity."

"(12.) To enter into a contract or contracts with any company or companies, individual or individuals for the wiring of houses and supply of electric fittings on any system of hire or deferred payment or on such other system as may appear beneficial to the general interests of the Company,

and also to make contracts for the supply of coin-freed or other meters for the supply of current." By virtue of a Provisional Order of the Board of Trade, confirmed in 1896 (called the Allerton Order), and as transferees from the Liverpool District Co., Ld., the Garston company were authorized to supply and did supply electrical energy in the urban districts of Allerton, Little Woolton, Much Woolton and Childwell. By virtue of a Provisional Order of the Board of Trade, confirmed in 1897 (called the Garston Order), and as transferees from the Garston Urban District Council, the Garston company were authorized to supply and did supply electrical energy in the urban district of Garston. In addition to these statutory undertakings the Garston company carried on an electrical fittings business within its area of supply. By an agreement, dated December 12, 1901, and made between the Garston and District Tramways Co., Ld., of the first part, the Garston company of the second part, and the Corporation of Liverpool of the third part, it was provided (by clause 1) that the corporation should, with certain specified exceptions, purchase the whole of the undertakings and works of the said companies respectively, and all their respective properties and assets, real and personal, with all their respective rights, powers and privileges, subject to all enactments, contracts and obligations affecting the same at the date of the completion of the purchase. By the Liverpool Tramways and Electric Supply (Garston Transfer) Act, 1902, this agreement was confirmed. The Act recited that the companies had respectively agreed to sell the whole of their undertakings to the corporation on the terms mentioned in the agreement, and that it was expedient that such agreement should be confirmed, and that such sale should be carried into effect accordingly, and that the undertakings of the companies respectively with all their rights, powers and privileges should be transferred to and vested in the corporation, subject to all contracts, obligations, rights and liabilities affecting the same. The statute enacted that the agreement was thereby confirmed and made binding upon the parties thereto. The purchase authorized by that Act was duly

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completed. By the Liverpool (Extension) Order, 1902, the boundaries of the City of Liverpool were extended so as to include the Garston district. Art. XVI. of that Order provided that the corporation should hold, enjoy and exercise for the benefit of the city within the enlarged boundaries all the powers which were exercisable by or vested in the corporation for the benefit of the city as it existed immediately prior to the commencement of the Order. A similar provision appeared in all orders by virtue of which the city boundaries were from time to time extended.

Ernest Page K.C., *Cartwright Sharp* and *H. G. Purchase* for the relators. The claim is that the defendants have no power to carry on the business complained of. There is no doubt that they are a common law corporation, but there is no Royal Charter under which they have the right to trade in electrical fittings. From the time of their first charter in the reign of John up to the present they have never claimed any such right. They are using their funds for this trade in a way not contemplated by the Municipal Corporations Act, 1882.

In *Attorney-General* v. *Leicester Corporation* (1) it was held that the supply of electrical fittings and apparatus for the use of consumers was ultra vires the corporation, although s. 10 of the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), provides that undertakers authorized to supply electricity may "enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply." The defendants have no power to do what they have been doing, unless they have specific parliamentary sanction; they have no such sanction either in respect of their Liverpool undertaking or of their Garston undertaking. Neither the Liverpool company nor the Garston company transferred their power to trade to the defendants.

[RUSSELL J. Do you say that the defendants did not purchase the shop, etc. ?]

Yes, they bought the shop, but they cannot carry it on,

(1) [1910] 2 Ch. 359.

unless they have parliamentary power; the defendants have no such power. If they could carry on the shop they could carry on anything the Garston company could do. The fact that the schedule to the Garston Act of 1902 professes to confer all the powers of one party on the other does not confer on the defendants the right to do all the things the Garston company could do in Liverpool, Buenos Ayres, or anywhere else.

The Electricity (Supply) Act, 1919 (1), applies to every undertaking, whether already existing or not, and this case comes under s. 23 of that Act. The real point in this case is whether the Liverpool Act of 1896 has conveyed to the defendants any right to carry on business as electrical contractors. For that it is necessary to look at the Act itself, and the Act speaks for itself. There is no provision in the Act giving the defendants, although they bought the rights of the Liverpool company, the power to use them. Sect. 4 only gives the defendants the powers, duties and obligations of the Liverpool company in relation to the supply of electricity under the Electric Lighting Acts, 1882 and 1888. It follows, therefore, that under the Act the defendants have not got the powers they claim.

The *Leicester Case* (2) was followed with approval in *Attorney-General* v. *Sheffield Corporation*. (3) Assuming that the Liverpool Act of 1896, plus the conveyance, does not give to the defendants the business carried on by the Liverpool company at the date of transfer, it seems to follow that so far as the Liverpool area is concerned the defendants have no powers to do the acts complained of. Then they must fall

(1) The Electricity (Supply) Act, 1919, s. 23, sub-s. 1, enacts: "A joint electricity authority and any local authority authorised by special Act or by order to supply electricity may provide, let for hire, and in respect thereof may connect, repair, maintain and remove (but shall not, unless expressly authorised to do so by the special Act or order, manufacture or sell) electric lines, fittings, apparatus and appliances for lighting, heating and motive power and for all other purposes for which electricity can or may be used, and with respect thereto may demand and take such remuneration or rents and charges, and make such terms and conditions, as may be agreed upon."

(2) [1910] 2 Ch. 359.

(3) (1912) 106 L. T. 367.

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back on the Garston Act of 1902, and they must say that that Act conveys to them everything. That Act transfers to them the undertakings of two statutory companies, and by it the two companies divested themselves of their rights, but there is nothing in the Act to say that the defendants acquired all the rights of the two companies. The doctrine in regard to the rights and powers of a corporation are clearly laid down by Cotton L.J. in *Reg.* v. *Reed* (1) and Brice on Ultra Vires, p. 124.

[RUSSELL J. It appears to me that under s. 23 of the Electricity (Supply) Act, 1919, the defendants have power to do everything except manufacture and sell.]

That section is not very clearly drawn. "In respect thereof" can only mean in connection with the letting for hire. "Provide" may mean provide for themselves, or it may mean provide for customers—i.e., supply customers. That can only be done in three ways: (1.) By selling; (2.) by letting; and (3.) by giving away. Selling is expressly prohibited; letting is allowed; local authorities are not usually allowed to make presents. "Provide" must mean provide for themselves—i.e., acquire. Having provided for themselves they are naturally allowed to let for hire. "Provided" in sub-s. 2 relates to the letting for hire in sub-s. 1.

Maugham K.C., *Courthope Wilson K.C.* and *Harold Mather* for the defendants. The relators do not sue as burgesses, nor do they allege that there is any fear that the defendants will lose any of their charters because they are carrying on this small business. This case is totally unlike *Jenkin* v. *Pharmaceutical Society of Great Britain.* (2)

The attempt to show that the defendants were trading outside their area has hopelessly broken down. Further, the evidence shows that instead of the borough fund being depleted, it is being added to by the profits on this trade.

The defendants are expressly authorized by the Liverpool Act of 1896 to carry on the business complained of. The recitals to the Act show that the whole of the Liverpool company's undertaking was sold to and vested in the

(1) (1880) 5 Q. B. D. 483, 488. (2) [1921] 1 Ch. 392.

defendants, and at the time of the transfer the Liverpool company were carrying on a large electrical fittings business. Sect. 2 of the Act defines what is meant by "undertaking." Sect. 10 directs the defendants to take over all the employees of the Liverpool company: that must include the employees in the electrical fittings departments. In the *Sheffield Case* (1) the only powers transferred by the Act were the statutory powers. The defendants need not have paid so much for the undertaking if they had left the fittings department to the Liverpool company.

Sect. 23 of the Electricity (Supply) Act, 1919, is an enabling section, which enables local authorities to do certain things which they could not do before without express authority. The words in brackets must be construed as showing that the joint electricity authority may not manufacture or sell. Those words are a proviso, and a proviso may have no operative effect: *West Derby Union* v. *Metropolitan Life Assurance Society*. (2) It is difficult to believe that those words were meant to prohibit a local authority from doing that which it is impliedly allowed to do. Sect. 3 of the Liverpool Act of 1896 vests all the rights, powers and obligations of the Liverpool company in the defendants, and that gives them an express power to sell. The defendants, therefore, do not come within the bracketed words, because the Act of 1896 gives them an express power to sell or manufacture. And we say, further, that the defendants do not come within s. 23 of the Act of 1919 at all, and that, therefore, the bracketed words do not affect them.

There is no question that, speaking generally, a corporation established by charter has all the common law rights of an individual; that differentiates it from a corporation established by Act of Parliament.

[They referred to *Baroness Wenlock* v. *River Dee Co.* (3); *British South Africa Co.* v. *De Beers Consolidated Mines* (4); and *Davis & Sons* v. *Taff Vale Ry. Co.* (5)]

(1) 106 L. T. 367.
(2) [1897] A. C. 647.
(3) (1883) 36 Ch. D. 685*n*.
(4) (1910) 79 L. J. (Ch.) 345.
(5) [1895] A. C. 542.

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Page K.C. in reply. If the defendants' interpretation of s. 23 of the Electricity (Supply) Act, 1919, is correct, then it would be correct to strike out the words "unless expressly authorised to do so by the special Act or order." That must be wrong. There must be an express authority in some Act or order, and it is impossible to find any such express authority here. Even if the Court holds against me on the interpretation of the Act of 1896, still I say the matter is concluded by s. 23 of the Act of 1919.

This is a business that ought not to be carried on by a corporation, because it is a business that may at any time be carried on at a loss.

Cur. adv. vult.

Nov. 17. RUSSELL J. In this action the Attorney-General (on the relation of certain ratepayers of the City of Liverpool) sues the Liverpool Corporation, and asks for a declaration that the defendants have no power to carry on the trade or business of (putting it shortly) supplying and repairing electric apparatus or fittings, or to expend for that purpose capital moneys borrowed for the purpose of their electric undertaking or the receipts thereof or the proceeds of rates levied by them or moneys forming part of their city fund. The plaintiff also asks for an appropriate injunction founded on such declaration.

The defendants are the statutory authority for the supply of electrical energy within the area of their city.

The plaintiff alleges in the statement of claim that the defendants are doing the acts complained of (which may compendiously be described as carrying on an electrical fittings business): (1.) In relation to houses and buildings within their area; (2.) in relation to houses and buildings without their area; and (3.) in relation to houses and buildings within their area to which they are neither supplying nor about to supply electrical energy. The defendants admit the first allegation, except that they do not in fact manufacture, but they deny the second and third allegation. The evidence in support of the second allegation broke down hopelessly at the

trial, and the allegation was promptly and properly withdrawn. No evidence was given in support of the third allegation.

The question which I have to decide is whether, in the circumstances, and upon the facts of this case, the Liverpool Corporation may at the risk, and, if necessary, at the expense of the ratepayers, carry on the business complained of.

The corporation have now for very many years carried on the business complained of. One thing is clear—namely, that in the absence of some special powers they would not be entitled to carry on such business merely because they are authorized to supply electrical energy within the city. Their powers in this respect cease with the delivery of electrical energy at the terminals: see *Attorney-General* v. *Leicester Corporation*. (1) The corporation however raise two defences. First, they say that they have statutory power to carry on this business by virtue of the Liverpool Electric Supply (Transfer) Act, 1896, and by the Liverpool Tramways and Electric Supply (Garston Transfer) Act, 1902. Particular reliance is placed on the former Act. These Acts I will refer to as the Transfer Act of 1896 and the Transfer Act of 1902. Secondly, they say that even if they are wrong in their first contention, they are a common law corporation incorporated and constituted by Royal Charter, and as such they have all the powers and rights of an individual subject only to the limitations as to the use of their funds contained in the Municipal Corporations Act, 1882, and that in carrying on the business complained of they have never transgressed, and do not transgress, those limitations. They do not allege that any charter in terms authorizes them to carry on an electrical fittings business.

I will now deal with the first point, which is based upon the view that the Legislature by the Transfer Act of 1896 gave to the corporation statutory power to acquire and carry on all the businesses owned and carried on by the Liverpool company. If this be so, no question of any alleged misapplication of funds can arise. The corporation would be entitled to carry on the business at the risk and expense

(1) [1910] 2 Ch. 359.

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of the ratepayers. To see whether the view put forward by the corporation is sound necessitates a close analysis of the provisions of the Transfer Act of 1896. The recitals are important. They include a recital of the Liverpool Order, 1892, and a reference to the sale and terms of purchase authorized by that Order. The sale authorized by the Liverpool Order, 1892, was expressly confined to the statutory undertaking severed from any other business of the Liverpool Company; the compensation in case of dispute was to be settled by arbitration under the Lands Clauses Consolidation Acts, the expression "other lands" in those Acts to include any undertaking or business of the company other than the Liverpool company's statutory undertaking. The Transfer Act of 1896 next recites that the Liverpool company have agreed to sell the whole of their undertaking (not, be it observed, severed from anything) to the corporation on the terms in the Act mentioned (not, be it observed, on the terms contained in the Liverpool Order, 1892), and that it is expedient that such sale should be carried into effect accordingly, and that the undertaking of the company with all their rights, powers and privileges should be transferred to and vested in the corporation. The final recital is to the effect that the objects aforesaid (which include the carrying into effect the sale and transfer of the undertaking) cannot be attained without the authority of Parliament. "The undertaking" is specifically declared to mean "the whole of the undertaking and other works of the Company and all their property and assets real and personal (except as hereinafter mentioned) with all their rights, powers and privileges as the same shall stand at the date of the completion of the purchase." The excepted items consist of the company's reserve and renewal fund and their minutes. Everything else including the goodwill of the fittings business is to be paid for by, to pass to, and be acquired by and vested in the corporation. That is the scheme undoubtedly indicated by the recitals. Let me now examine the sections of the Act. [His Lordship read several of the sections of the Act set out above.]

Sect. 8 is of great importance in view of one argument advanced on behalf of the plaintiffs. It was said that even if the undertaking and business of the company over and beyond the statutory undertaking had been by this Act transferred to and vested in the corporation, it was not the intention of the Act that such other undertaking and business should be carried on by the corporation. Apparently the corporation was to expend moneys in acquiring something which they could not turn to account either by selling it elsewhere or by working it for their own benefit.

Sect. 8 provides for what is to happen in the interval between January 1, 1895, and completion. During that period the company are to be deemed to carry on their undertaking (which includes everything except the specifically excepted items) "for the benefit of the Corporation." During the period the company may increase their liabilities (which the corporation ultimately have to discharge) for the reasonable extension of their business in order to carry out their statutory obligations or otherwise in the proper conduct of the company's business. Further, the company are placed under obligation during the period to carry on their undertaking (not merely their statutory undertaking) "for the benefit of the Corporation." It is difficult to see what benefit the corporation are going to derive as regards a business outside the statutory undertaking if the moment it is handed into their charge it is struck with sterility, and they are unable to turn it to account by sale or management.

A consideration of the provisions of the Transfer Act of 1896 leaves no doubt in my mind as to its intention and operation. It is in direct contrast to the Liverpool Order of 1892, and is framed on the footing, and in my opinion it provides in terms, that the corporation are to step into the shoes of the Liverpool company and to have power to carry on the whole undertaking and all the businesses of the Liverpool Company. Under and by virtue of the Transfer Act of 1896 the corporation became in my opinion entitled to carry on the business carried on by the Liverpool company —namely, an electrical fittings business. Having come to

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this conclusion it is unnecessary for me to consider or analyse the provisions of the Transfer Act of 1902. The corporation do not need to rely upon it: but this much may be said, that the provisions of the Transfer Act of 1902 are materially different from those of the Transfer Act of 1896 and resemble those of the Sheffield Act. It would in my opinion be much more difficult to distinguish this case so far as it depends upon the Transfer Act of 1902 from the Sheffield case. It is said that the decision in the case of *Attorney-General* v. *Sheffield Corporation* (1) is against this view. I do not agree. The Act of Parliament in that case was (as appears both from the Law Times Report and from a perusal of the Act itself) completely different in its terms from the provisions contained in the Transfer Act of 1896. The power so acquired by the corporation in 1896 applies by virtue of the provisions in the orders made on the subsequent extensions of the city area to the whole of the city as it now exists.

One argument of the plaintiff I must deal with at this stage. It is founded upon the terms of the badly drafted memorandum of association of the Liverpool company. The objects clause contains the following words: "To manufacture, hire, let, license, repair or sell all necessary machinery, apparatus, materials or things for any of the before mentioned purposes in the district aforesaid." In the body of the memorandum no district is mentioned as such; and it is said that although the Liverpool company were in fact carrying on an electrical fittings business in Liverpool they had no power so to do, because there being no "district aforesaid" the clause in question in the memorandum was of no effect. Accordingly no power to carry on such a business passed to the corporation under the Transfer Act of 1896. This is an extravagant argument. The very name of the company which appears in the body of the memorandum shows the district to be the district of Liverpool. There is nothing in this point.

In the result I decide in the defendants' favour upon their first ground of defence.

(1) 106 L. T. 367.

Their second ground of defence accordingly does not arise, but since a decision thereon would involve a consideration of the evidence given before me, and since this case may possibly come before a higher tribunal, I think it right to make a few observations in regard thereto. Whether the defendants as a common law corporation have the full powers of an individual as claimed by them I need not decide, but the language used by Bowen L.J. in *Baroness Wenlock* v. *River Dee Co.* (1) and other authorities strongly support this view. The evidence given in connection with this defence was directed to the point whether or not the corporation's electrical fittings business had been carried on at a loss. The published accounts of the corporation show every year a profit to have been made on that business, but on the face of the accounts the profit as shown would seem to be a gross profit—i.e., a profit against which no establishment charges had been charged. Accordingly the plaintiffs called evidence to show that had proper charges been deducted the profit would except in a few instances have been turned into a loss. Therefore, they argue, the defendants have or must have resorted to funds for the purposes of this business in transgression of the limitations imposed by the Municipal Corporations Act, 1882. I will not analyse the evidence in detail. A Mr. Tweedie Smith was called on behalf of the plaintiff to propound views formed from inspection of some of the corporation's books. He is not an accountant; he is the solicitor for the relators and also for the Electrical Contractors' Association who are financing this action. His evidence I consider grotesque and of no assistance to the Court. Mr. Cash (an electrical contractor) and Mr. Tait (an electrical engineer and now secretary to the Electrical Contractors' Association) were also called. They deposed to the various items which constituted establishment charges and stated the different percentages which should in their opinion be deducted according to the turnover. Both these witnesses spoke without any knowledge of the details and facts concerning the corporation's electrical fittings business,

(1) 36 Ch. D. 685*n*.

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but they suggested the application of some hard and fast rule of percentage, upon the footing of course that before arriving at the profit shown in the published accounts of the corporation no allowance had been made in respect of items properly classed as establishment charges. I doubt whether a hard and fast rule may in all cases be properly applied. But, however that may be, the evidence on behalf of the corporation effectively disposed of the plaintiff's suggestions.

The defendants called Mr. Arthur Collins, an expert accountant. I have never come across a more accurate and reliable witness than Mr. Collins. He had carefully examined the corporation's books, for the last ten years, and more particularly for the years 1916 to 1920. He showed that in fact many of the items of establishment charges which the plaintiff's witnesses said should be taken into account had in fact been taken into account; and after making all necessary further allowances he says that every year from 1911 to 1920 shows a profit, with one exception. The exception is 1913, and in that year in fact a profit of 270*l.* was made; but owing to a debit of 670*l.* appearing in that year's accounts, whereas the corresponding credit had appeared in the previous year's accounts, the profit of 270*l.* was turned in the accounts into a loss of 400*l.* He further stated emphatically, as a result of his investigation of the corporation's books and accounts, that there has been no charge on the borough fund as a result of the corporation's electrical fittings business, but that on the contrary the corporation funds have benefited thereby. His figures and statement were not, and indeed could not be seriously challenged in cross-examination. I accept his evidence fully and without reserve, and I find that the corporation have not in fact, in carrying on their electrical fittings business, expended or applied any capital moneys borrowed for the purpose of the electric undertaking or the receipts thereof, or the proceeds of rates or moneys forming part of the city fund, or in any respect transgressed the limitations contained in the Municipal Corporations Act, 1882.

One further point remains to be dealt with. Both sides rely on s. 23 of the Electricity (Supply) Act, 1919. This is

a public statute, and the section causes some difficulty in its construction and application. It is in the following terms: "A joint electricity authority and any local authority authorised by special Act or by order to supply electricity may provide, let for hire, and in respect thereof may connect, repair, maintain and remove," and then come these words in brackets, "but shall not, unless expressly authorised to do so by the special Act or order, manufacture or sell," the bracket is then closed, "electric lines, fittings, apparatus and appliances for lighting, heating and motive power and for all other purposes for which electricity can or may be used, and with respect thereto may demand and take such remuneration or rents and charges, and make such terms and conditions, as may be agreed upon." Then sub-s. 2: "Any electric lines, fittings, apparatus and appliances provided by or on behalf of any authorised distributors on consumer's premises either before or after the passing of this Act, and any lands, buildings, or works held by them in connection therewith shall be deemed to form part of the undertaking authorised by the special Act or order relating to such authorised distributors." For the moment I will treat the words in brackets as being omitted from the section. Upon that footing the section enables a local authority (which is authorized by special Act or by Order to supply electricity) to do the following things: (*a*) to provide electric lines, fittings, apparatus and appliances for all purposes for which electricity can or may be used. The various items may be compendiously described as electrical apparatus; (*b*) to let on hire such electrical apparatus; (*c*) in respect of such electrical apparatus, to connect, repair, maintain and remove the same; (*d*) with respect to such provision, letting on hire, connection, repair, maintenance and removal to take such remuneration or rents and charges and to make such terms and conditions as the local authority and customer may agree upon. If the section had not contained the words in brackets, this section would have enabled the corporation to do all the acts and things complained of here. Even with the bracketed words the section is a complete answer to this action in respect of all

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the acts and things complained of except manufacture and sale, and this even if I were wrong in my decision as to the effect of the Transfer Act of 1896. What is the effect of the words in brackets, "but shall not unless expressly authorised to do so by the special Act or order manufacture or sell"? The plaintiffs say that the words are a statutory prohibition of manufacture or sale by any local authority who cannot point to words in their special Act or Order in terms stating that they may manufacture or sell, and that no matter how lawful such operations might have been on the part of a local authority before the Act such operations became unlawful and forbidden by the Act in the case of a local authority which could not find such words in their special Act or Order. They further say that the Liverpool Corporation were not expressly authorized within the meaning of the section.

On the other hand the defendants say that the section is purely an enabling section, that it is not a disabling section, that the words in brackets are really a proviso on the enabling words of the section inserted in order to prevent a local authority which claimed the benefit of the powers given by the enabling words from claiming under those powers a right to manufacture or sell. If they had that power expressly from another source, well and good; but a power to manufacture and sell was not to be included in the fresh powers acquired under this section. Accordingly they say that the words in brackets have no reference to their case at all. They further say that in any event the effect of the Transfer Act of 1896 is that they are expressly authorized within the meaning of the section.

After much consideration I have come to the conclusion that the defendants' contention is the right one. The words in brackets appear to me to constitute a proviso—i.e., they are words inserted for the purpose of preventing any claims being established that the preceding words or any of them included or involved a power to manufacture or sell: see and compare the views of Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society*. (1) I cannot think that

(1) [1897] A. C. 647, 655, 656.

this section was intended to or is operative to close down existing businesses (without hint of compensation), or otherwise to deprive local authorities of powers granted to them undoubtedly, though not necessarily, in express terms in special Acts or Orders, or of powers granted to them in express terms in instruments other than special Acts or Orders. I am further of opinion that the Liverpool corporation are by the Transfer Act of 1896 "expressly authorised." The corporation's power to sell is not a power implied from the provisions of the Transfer Act of 1896. That Act in express terms vests "the undertaking" in the corporation, and the undertaking as defined by the Act includes all the company's rights, powers and privileges as they should stand at the date of completion. One of those rights, powers and privileges was the power to sell. That power appears to me to have been expressly vested in the corporation by the Act, and not the less so because evidence must be given to establish what powers stood at the date of completion. This is not a question of implying the existence of a power arising from a state of circumstances created by an Act. It is a question of seeing whether the Act by its language gives the power. It is not, in my opinion, necessary to find the power mentioned in express words in the Act. Whatever the language used in an Act necessarily or even naturally implies is expressed thereby: see per Willes J. in *Chorlton* v. *Lings*. (1) So here when the language of the Transfer Act of 1896 necessarily or naturally implies the exercise by the corporation of certain powers (which include in fact a power to sell) the corporation is, in my opinion, expressly authorized by that Act to sell.

The plaintiff's action accordingly fails on all points and must be dismissed with costs.

Solicitors for relators: *Turner & Co.*

Solicitors for defendants: *F. Venn & Co., for G. H. Etherton, Town Clerk of Liverpool.*

(1) (1868) L. R. 4 C. P. 374, 387.

P. J. B.

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FASBENDER *v.* ATTORNEY-GENERAL.

[1921. F. 1082.]

Aliens—Nationality—British-born Woman—Marriage to Alien in Time of War—Loss of British Nationality—No dual Nationality—Property in England—Charge under Treaty of Peace Order, 1919, *s.* 1, *cl.* (xvi.)—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 10.

A natural-born British woman who marries an alien enemy in time of war shall be deemed to be an alien, as from the date of her marriage, within the meaning of s. 10 of the British Nationality and Status of Aliens Act, 1914, which enacts: "The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien."

The Treaty of Peace between the Allied and Associated Powers and Germany was signed on June 28, 1919, but it did not come into force until January 10, 1920. On November 3, 1919, M. D., a natural-born British woman, married E. F., a German subject. At the date of her marriage, and on January 10, 1920, she was the registered holder of certain fully paid shares in an English limited company:—

Held, that the above-mentioned shares were subject to the charge imposed by s. 1, cl. (xvi.), of the Treaty of Peace Order, 1919, on the property of alien enemies.

THE plaintiff was born at Lincoln in 1876, and was the daughter of British subjects. Before the outbreak of war between this country and Germany she had become engaged to be married to one Ernest Fasbender, a German subject. The Treaty of Peace between the Allied and Associated Powers and Germany was signed at Versailles on June 28, 1919. This Treaty of Peace did not, however, come into force until January 10, 1920. Until that date, notwithstanding the cessation of hostilities and notwithstanding the signing of the Treaty, Fasbender was and continued to be an enemy. In October, 1919, the plaintiff obtained a passport and proceeded to Germany, where, on November 3, 1919, she became the wife of Fasbender. On each of the above-mentioned dates the plaintiff was the registered holder of certain fully paid shares in an English limited company. These shares were taken by the Public Trustee as custodian of enemy property, and he claimed that, by her marriage, the plaintiff had become a German national, and that her property had become subject

to the charge on the property of German nationals created by the Treaty of Peace Order, 1919, and he declined to exercise in her favour the power vested in him under the Treaty of Peace Order, 1919, as amended by the Treaty of Peace (Amendment) Order, 1920, to release her property from the charge. The plaintiff, by her statement of claim, contended that she is and was at all material times a British subject, and not a German national, and she claimed a declaration that her property in England on January 10, 1920, was not and is not subject to any charge under the Treaty of Peace with Germany or the Treaty of Peace Order, 1919.

Romer K.C. and *Wallington* for the plaintiff. According to English municipal law it was impossible for the plaintiff in November, 1919, to throw off her allegiance to the British Crown, and she could not, by her marriage, cease to be a British subject. According to English municipal law a person is either a British subject or an alien, and the property of a British subject cannot be charged by an order which purports to charge the property of an alien. This proposition is contrary to a decision of P. O. Lawrence J. in *In re Chamberlain's Settlement.* (1) We shall ask the Court not to follow that decision.

During a state of war a British subject cannot throw off his or her allegiance. There have been two decisions on that point: *Rex* v. *Lynch* (2); *Ex parte Freyberger.* (3) Therefore a woman cannot, by her marriage to an alien enemy, throw off her allegiance. Sect. 10 of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), which enacts that a British-born woman who marries an alien becomes a statutory alien only applies in time of peace. In *Ex parte Freyberger* (3) it was held that a natural-born British subject cannot make a declaration of alienage under s. 14 of the British Nationality and Status of Aliens Act, 1914, in time of war. The law is well laid down in Halleck's International Law, 4th ed., p. 461, ch. 12, s. 29.

(1) 37 Times L. R. 966; since reported [1921] 2 Ch. 533.

(2) [1903] 1 K. B. 444.

(3) [1917] 2 K. B. 129.

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Then there arises the question whether the plaintiff's marriage was a legal marriage. A marriage celebrated abroad between a British subject and a foreign subject is good only if both have the capacity to marry: Dicey's Conflict of Laws, 2nd ed., p. 613. It may be that according to English law the plaintiff was incapable of entering into a marriage with an enemy.

If the plaintiff has changed her allegiance it can only be by virtue of the Act of 1914, but that Act must be read as not applying in time of war.

If the Court is of opinion that the plaintiff is still a British subject, then the question of dual nationality arises: *In re Chamberlain's Settlement.* (1) It would be very strange if a Spanish or Dutch subject, who is also a German national, should become charged. The Treaty of Peace Order, 1919, imposes a charge on the property of German nationals only; it could not be intended to impose a charge on the subjects of Allied or Associated Powers. Where there is a reference in an Act of Parliament to a German national, it must mean some one who is not a British subject. Statutes which encroach on the rights of the subject, whether as regards person or property, should be strictly construed. They should be interpreted, if possible, so as to respect such rights; Maxwell on the Interpretation of Statutes, 6th ed., p. 501. And public treaties should be interpreted like statutes: Wheaton's International Law, 4th ed., p. 403. If the decision in *In re Chamberlain's Settlement* (1) is upheld it would lead to many absurdities. Under the Treaty of Peace the Egyptian Government could turn out of Egypt a British subject who is a German national.

Gavin T. Simonds (*Sir Gordon Hewart A.-G.* with him) for the defendant. It is true that at common law a woman did not change her nationality by marriage, but by virtue of s. 10 of the Act of 1914, the plaintiff ceased to be a British subject when she married an alien. *Rex* v. *Lynch* (2)

(1) 37 Times L. R. 966; since reported [1921] 2 Ch. 533.
(2) [1903] 1 K. B. 444.

and *Ex parte Freyberger* (1) turned on the fact that a person cannot acquire a statutory right by an act which is in itself treasonable. If the plaintiff is to succeed she must show that her marriage is illegal and invalid. In *Ex parte Freyberger* (1) the applicant had made a declaration of alienage under s. 14 of the Act of 1914. If that act was not treasonable, it was at least nugatory. Here the change of status is by an act that is not in itself treasonable. A marriage is something different from the cases of trading with an enemy.

The plaintiff is a German national, and under s. 10 of the Act of 1914 she is a person of dual nationality, although her marriage took place in time of war. There are bound to be absurdities whatever view is taken of the question of dual nationality. The decision in *In re Chamberlain's Settlement* (2) is right.

Romer K.C. in reply. In *Rex* v. *Lynch* (3) the Court found that what Lynch had done was an act of treason, but in *Ex parte Freyberger* (1) the applicant had done nothing that could be called an act of treason.

[RUSSELL J. Sect. 10 of the Act of 1914 says that the wife of an alien shall be deemed to be an alien; it does not say that if a woman marries an alien she shall be deemed to be an alien.]

That section must be qualified by saying that it does not apply to a marriage in time of war, or to the wife of a British subject who changes his allegiance in time of war. The act of marriage was treasonable, and, therefore, does not change the status. In *Rex* v. *Casement* (4) the Court was of opinion that any act either in this country or elsewhere that gave comfort to the King's enemies was a treasonable act. Any act or communication between a British subject and an alien enemy in time of war is of no effect: *Ertel Bieber & Co.* v. *Rio Tinto Co.* (5)

There must be an express power to enable the Crown to

(1) [1917] 2 K. B. 129.
(2) 37 Times L. R. 966; since reported [1921] 2 Ch. 533.
(3) [1903] 1 K. B. 444.
(4) [1917] 1 K. B. 98.
(5) [1918] A. C. 260.

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deprive a British subject of his property : *Newcastle Breweries* v. *The King*. (1) The custodian has been given no such express power.

Cur. adv. vult.

Nov. 24. RUSSELL J. Miss Mary Dawson was born at Lincoln on August 4, 1876, of British parents. She was a natural-born British subject. Before the outbreak of war between this country and Germany she had become engaged to be married to one Ernest Fasbender, a German subject. On June 28, 1919, there was signed at Versailles the Treaty of Peace between the Allied and Associated Powers and Germany. This Treaty of Peace did not, however, come into force until January 10, 1920. Until that date, notwithstanding the cessation of hostilities and notwithstanding the signing of the Treaty, Ernest Fasbender was and continued to be an enemy. In the meantime Miss Mary Dawson, with no thought or design in her mind save matrimony, obtained a passport and proceeded to Germany, where, on November 3, 1919, she became the wife of Ernest Fasbender, whose wife she still is.

She was the registered holder of certain fully paid shares in an English limited company, and she owned those shares on January 10, 1920. If on that date she was a German national within the meaning of s. 1, cl. (xvi.), of the Treaty of Peace Order, 1919, those shares became subject to the charge created thereby.

The question which I have to answer is whether the plaintiff was, on January 10, 1920, such a German national. Mr. Romer on her behalf raises two points : (1.) He says that she could not, even though she wished so to do, throw off her allegiance to the British Crown in time of war. Consequently she did not by her marriage to a German cease to be a British subject, and had not ceased to be a British subject on January 10, 1920. (2.) He says that (assuming his first point to be established) she was on January 10, 1920, a British national according to the municipal law of this

(1) [1920] 1 K. B. 854.

country, although no doubt a German national according to the municipal law of Germany. She was a person of dual nationality; and that such a person, or, at all events, such a person who possesses, as one of her nationalities, British nationality, cannot be a German national within the meaning of s. 1, cl. (xvi.), of the Treaty of Peace Order, 1919.

To deal with the first point: At common law a British subject could not by any voluntary act of his own divest himself of his British nationality—and this whether this country were at peace or at war. His right to do so to-day depends on statute. Under the Naturalization Act, 1870, it is provided (by s. 6) that any British subject who has at any time before, or may at any time after the passing of the Act, when in any foreign State and not under disability as therein defined voluntarily become naturalized in such State, shall be deemed to have ceased to be a British subject and be regarded as an alien. It is further provided (by s. 10) that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. The Act of 1870 has been superseded and repealed by the British Nationality and Status of Aliens Act, 1914. The sections of that Act which are relevant to the present argument are ss. 10, 11, 13 and 14. Sect. 10 is: "The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject." Sect. 11 is: "A woman who, having been a British subject, has by, or in consequence of, her marriage become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject." Sect. 13 is: "A British subject who, when in any foreign

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state and not under disability, by obtaining a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject." Sect. 14, sub-s. 1, is: "Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." Sub-s. 2 is: "Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject." It is argued that s. 10 of the 1914 Act must be read as enacting that a female British subject who marries an alien shall thenceforth be deemed an alien; just as s. 13 in terms enacts that a British subject who becomes naturalized in a foreign State shall thenceforth be deemed to have ceased to be a British subject; and just as s. 14 in terms enacts that in certain circumstances a natural-born British subject may make a declaration of alienage, and, on making the declaration, shall cease to be a British subject. In other words that all three sections provide that a British subject on doing a particular act may produce the result of loss of British nationality. If this be so (the argument proceeds) there is authority to show that if the particular acts specified in ss. 13 and 14 be done at a time when this country is at war, the result is not in fact produced, because the sections have no application to the case when the acts specified are done in time of war. Accordingly the same authorities must be applied to s. 10, and it must be held that if a woman marries in time of war an alien who is an enemy, British nationality is not lost by her. The authority referred to under s. 13 is the case of *Rex* v. *Lynch*. (1) The section there in question was s. 6 of the Act of 1870, but in this regard

(1) [1903] 1 K. B. 444.

there is no material difference between that section and s. 13 of the Act of 1914. Lynch had been indicted for high treason. He was a British subject, but on January 18, 1900 (while this country was at war with the South African Republic), he obtained a grant of letters of full naturalization from that Republic. As a necessary condition to his obtaining the grant, and before he obtained it, he was bound to do, and in fact did do, two things. He signed a declaration of his willingness to take up arms for the Republic, and he took an oath of allegiance to the Republic. The overt acts charged in the indictment included not only those two acts, but other acts alleged to have been committed subsequently to the grant of the letters of naturalization. It was argued on his behalf that having obtained the letters of naturalization he was no longer a British subject, that he was protected from the consequences of all the overt acts charged, including those of making the declaration and taking the oath as being part and parcel of one transaction which culminated in the grant of the letters of naturalization. The Court held that s. 6 of the Act of 1870 did not empower a British subject to become naturalized in an enemy State in time of war, and that the act of becoming naturalized under such circumstances was itself an act of treason ineffectual to afford protection against an indictment for treason in respect of subsequent overt acts. The Court further held that in any event the naturalization could afford no defence in respect of the making of the declaration and taking the oath of allegiance, which preceded the grant of letters of naturalization. Lord Alverstone uses this language (1): "It is not disputed on behalf of the prisoner that, apart from the Naturalization Act, 1870, the alleged naturalization in the enemy State would afford no defence. But reliance is placed on s. 6 which provides that,"—and then he reads the section. "It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect to the two first overt acts, for by s. 15, 'Where any British subject

(1) [1903] 1 K. B. 458.

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has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.' And it cannot be seriously contended that the two first acts which formed the basis of the naturalization, and without which naturalization could not under the circumstances have been obtained at all, were not 'done before the date of his so becoming an alien' within the meaning of s. 15. But, further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person whatever. If it was the intention of the Legislature to produce so strange a result, that intention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance." The Lord Chief Justice seems to base his conclusion upon two grounds—namely, (1.) that s. 6 does not apply to naturalization in an enemy country in time of war, and (2.) that no person can claim rights which would be the result of an act of treason. Wills J. puts his decision on the latter ground. Channell J. puts his decision rather on the former ground. His language is as follows (1): "The section is not dealing with the circumstances under which naturalization may be legal or may be illegal, but with the consequences of the naturalization. It assumes throughout that naturalization did exist, and was not in itself unlawful, and then it says that where naturalization in a foreign State has taken place or may take place it shall have certain consequences. It does not make naturalization under the

(1) [1903] 1 K. B. 459.

particular circumstances more legal or more illegal than it was before. And it is not disputed that before the Act naturalization in a foreign State with which we were at peace was legal, but in an enemy State was obviously illegal and an act of treason." The decision seems to me to amount to this, that if a British subject in time of war, and as regards an enemy State, takes the active step contemplated by s. 6 he is guilty of treason, and that the result provided for by the section does not flow from that step either because no rights can flow from an act of treason or because the section only applies to steps taken as regards a foreign State with which this country is at the time at peace. But the particular step in question in that case was the step specifically mentioned in the section, and was a step which could only be taken for the purpose of acquiring a nationality other than British and for no other purpose.

The authority relied upon under s. 14 of the Act of 1914 is the case of *Ex parte Freyberger*. (1) Freyberger was an English subject according to English law, but by Austrian law he was an Austrian subject. He was a person who fulfilled exactly the description in s. 14, sub-s. 1, of the Act of 1914. He was called up for military service here, and while still an infant he was handed over to the military authorities. On obtaining the age of twenty-one years he made a declaration of alienage under s. 14, and thereupon claimed to be released from military service as an alien. Freyberger obtained a rule nisi for a writ of habeas corpus directed to the commanding officer of his battalion. The rule was discharged by a Divisional Court consisting of Lord Reading, Ridley and Horridge JJ. The point for decision was whether Freyberger had, under s. 14, sub-s. 1, ceased to be a British subject. Lord Reading held that s. 6 must be read subject to the principle that a person cannot divest himself of his British nationality during time of war and become a subject of an enemy State; and as an authority for that principle he cites *Rex* v. *Lynch*. (2) He further states that a British subject cannot in time of war make a valid declaration of

(1) [1917] 2 K. B. 129. (2) [1903] 1 K. B. 444.

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alienage. Ridley J. relies also on *Rex* v. *Lynch* (1) for the proposition that a declaration under s. 14 cannot be made (meaning of course "validly made") in time of war. Horridge J., following *Rex* v. *Lynch* (1), decides that the declaration under s. 14 cannot be made after declaration of war, so as to make the declarant solely the subject of a State at war with this country. The Court of Appeal affirmed this decision. Swinfen Eady L.J. propounds the question for decision in this form (2): "Can the appellant validly make a declaration of alienage during the existence of a state of war between this country and Austria?" He applies *Rex* v. *Lynch* (1), and then answers the question in the following general terms (3): "A British subject, although having a double nationality, cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy State." Notwithstanding the generality of the language used the Lord Justice is obviously answering his question in the negative, and is in terms dealing only with s. 14. The Lord Justice dismissed the appeal upon a second ground as well, which is immaterial here. Bankes L.J. decides the appeal on the second ground only, while Bray J. agreed with Swinfen Eady L.J. on both points. These two authorities are, of course, binding as regards ss. 13 and 14. But do they really touch s. 10 at all? They decide that formal acts whose sole object is (under s. 13) to acquire enemy nationality and terminate British nationality, and (under s. 14) to terminate British nationality so as to leave enemy nationality as the sole survivor, cannot in time of war be effective to produce those results. Sect. 10 is very different in form. No act is in terms mentioned except in the proviso, which does not concern us. The section deals merely with the national status of married women, and it enacts that the wife of an alien is to be deemed an alien. The section is not, except as to the proviso, an empowering section at all. Under the section alienage attaches in invitam to the wife as a statutory by-product

(1) [1903] 1 K. B. 444. (2) [1917] 2 K. B. 138.
(3) [1917] 2 K. B. 139.

of marriage to an alien husband. Alienage is not the sole object of the marriage, or even its primary object; nor can it be reasonably said to fall within its objects at all. On the other hand ss. 13 and 14 are empowering sections, and under them the termination of British nationality is a voluntary act on the part of the British subject for the accomplishment of which, and for no other purpose, he takes the steps prescribed by those sections. It appears to me that the cases of *Rex* v. *Lynch* (1) and *Ex parte Freyberger* (2) have no real application to s. 10.

The plaintiff's marriage is undoubtedly valid under German law, and unless I am prepared to hold (which I am not) that her marriage was a nullity according to the laws of this country, she is now the lawful wife of an alien. Being the lawful wife of an alien she falls within the section. She is to be deemed an alien; this result flows upon her in spite of herself and not as the result of any action performed by her with the object of withdrawing from allegiance to the British Crown. It is said that under s. 10 her alienage during the period of the war is suspended. I cannot find this theory of suspension supported, either by s. 10 or by the authorities cited under the other sections. The war is now at an end. The plaintiff is the lawful wife of an alien. Is she now an alien? It is difficult to see how she is not, in face of the section. If she is, how and when did she become such? Surely, unless I am to redraft the section completely, at the time of her marriage. No other time is indicated or contemplated. If I am right in this no dual nationality exists, and the second point does not arise.

But I would add this. If I am wrong on the first point, the second point is completely covered by the decision of P. O. Lawrence J. in the case of *In re Chamberlain's Settlement.* (3) Mr. Romer conceded that the decision covered the exact point. He invited me not to follow it. Although I am not in strictness bound by the decision it nevertheless is founded on a considered written judgment, which is the

(1) [1903] 1 K. B. 444.
(2) [1917] 2 K. B. 129.
(3) 37 Times L. R. 966; since reported [1921] 2 Ch. 533.

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only judgment on record dealing with the matter. In those circumstances judicial comity would have prompted me to follow it, and had it become necessary to decide that part of this case I should without comment have followed *In re Chamberlain's Settlement.* (1)

In the result the action fails and must be dismissed.

Solicitors: *Cruesemann & Rouse; Treasury Solicitor.*

P. J. B.

C. A. 1921 Dec. 14, 15, 16.

STEAM SAW MILLS COMPANY, LIMITED *v.* BARING BROTHERS AND COMPANY, LIMITED.

ARCHANGEL SAW MILLS COMPANY *v.* BARING BROTHERS AND COMPANY, LIMITED.

[1920. S. 2390.]

Banker—Money received by Bank as Agents of Foreign Government—Principal and Agent—Right to sue Agent in Absence of Principal—Contract—Failure of Consideration—Money paid to Bank under Mistake of Fact—Right to recover.

In 1917 the plaintiffs, under licence from the Russian Imperial Government, exported timber to this country, and, in accordance with the conditions of the licence, paid the purchase money received by them for the timber to the defendant bankers for the credit of the Russian Government. They then became entitled to receive from the Government in Russia an equivalent amount in roubles at a fixed rate of exchange. In March, 1917, the Imperial Government was overthrown by a revolution, and was succeeded by a Provisional Government, which in its turn, was, on November 7, 1917, displaced by the Bolshevists, who, on December 13, forcibly dissolved the Constituent Assembly and established a Soviet Republic. The plaintiffs, having received no roubles in Russia, brought actions against the bankers to recover two sums of money, one of which was paid to them by the plaintiffs in the second action before November 7, and the other by the plaintiffs in the first action on November 9, at which date they did not know of the Bolshevist revolution. The plaintiffs in both actions alleged that the bankers and the Russian Government were merely trustees for them, and the money having been paid under a contract, the consideration for which had entirely failed, they were entitled to recover. The plaintiffs in the first action further contended that they had paid the money under a

(1) 37 Times L. R. 966; since reported [1921] 2 Ch. 533.

mistake of fact, and on that ground also they were entitled to recover it:—

Held, by the Court of Appeal, affirming the decision of P. O. Lawrence J., that this money had been paid to the bank as agents for the Russian Government, and the Court would not order payment of it in the absence of that Government or its representatives. There had been no failure of consideration of the contract between the plaintiffs and the Russian Government. The consideration was the granting of the export licence, and had not failed, because the licence had been granted and exercised. As to mistake of fact, the fact of which the plaintiffs were ignorant was not one which, if they had known it, would necessarily have discharged them from the liability to make the payments in question. The bank were entitled to keep the money in their hands, but must undertake not to part with it without notice to the plaintiffs and an order of the Court.

Two appeals from the decision of P. O. Lawrence J.

The two plaintiff companies were exporters of timber from Russia. During the European War they obtained licences from the then existing Imperial Russian Government to export timber, one of the conditions of the granting of such licences being that they should pay the amount received by them for the sale of the timber to a specified bank in the country of sale as agents for the Russian Government, who would notify the payment to the Chancellerie de Crédit, a department of the Russian Government, and that body would then pay to the exporters (the plaintiffs) in Russia the equivalent in roubles at a rate of exchange to be fixed by the Chancellerie. The Imperial Government was overthrown by a revolution in March, 1917, and was succeeded by the Provisional Government of M. Kerensky. On November 7, 1917, the Bolshevist revolution took place, and the Soviet Government usurped the executive power, and on December 13, 1917, dissolved the constituent assembly and abolished the Chancellerie de Crédit. On October 2, 1917, the plaintiffs in the second action paid to the defendant bank, as agents for the Russian Government, the sum of 15,000*l.*, being the proceeds of timber exported by them and sold to the British Government. On November 9, 1917, the plaintiffs in the first action paid to the defendant bank, as such agents, the sum of 20,000*l.*, representing the proceeds of a similar sale of timber. These payments were duly

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notified to the Chancellerie de Crédit, but that body had made no corresponding payment of roubles to the plaintiffs. The plaintiffs brought these actions against the defendant bank to recover the two sums of 15,000*l.* and 20,000*l.* On November 9, when the 20,000*l.* was paid to the defendant bank, the Bolshevist revolution was not known in this country to have taken place, and the plaintiffs in the first action alleged that that payment was made under a mistake of fact and was therefore recoverable. As to both sums the plaintiffs contended that there had been a complete failure of consideration, and that they alone were entitled to the money in the hands of the bank. The money had been paid into Court in the actions, and the Attorney-General had, at the request of the Treasury, been added as a party to represent the Crown in respect of any claim which they might have as against the present or any future Russian Government.

At the commencement of the actions the British Government had not recognized the Soviet Government of Russia; but on March 16, 1921, a trading agreement was entered into between the British Government and the Government of the Russian Soviet Republic, whereby it was declared that all claims of either party or of its nationals against the other party in respect of rights or obligations incurred by the existing or former Governments of either country should be equitably dealt with in a proposed formal general peace treaty. And the Soviet Government recognized in principle that it was liable to pay compensation to private persons who had supplied goods or services to Russia for which they had not been paid.

P. O. Lawrence J. held that the payments were made to the defendant bank on account of the Russian Government, from whom alone they could be recovered, and he dismissed the actions.

The plaintiffs appealed, and the two appeals were heard together.

A. Grant K.C. and *Heckscher* for the appellants. Under the circumstances of this case the appellants are now entitled to

recover these two sums of money. The late Russian Governments were in the position of exchange brokers. Baring Bros. received these sums in England for the purpose of passing the money through the Russian Government in the form of roubles to the appellants in Russia. Baring Bros. duly notified to the Russian Government the receipt by them of the money, but the appellants have not received the equivalent or any amount in roubles. The Soviet Government have never accepted any of the obligations of their predecessors, there is, therefore, a complete collapse of the bargain originally made by the appellants with the Imperial Government, and possibly continued with the Provisional Government of M. Kerensky. The consideration for the contract has entirely failed and the money received by Baring Bros. ought to be repaid to the appellants. As to the 20,000*l.* paid by the Steam Saw Mills Company to Baring Bros. on November 9, 1917, it was paid to them as agents of a non-existing principal. Alternatively it was paid by the appellants under a mistake of fact as to the continued existence of the Kerensky Government, and they are entitled to recover it on that ground also. They would never have paid it to Baring Bros. had they known the facts: *Kerrison* v. *Glyn, Mills, Currie & Co.* (1); *Kelly* v. *Solari* (2); *Aiken* v. *Short.* (3)

Sir Gordon Hewart A.-G., Dighton Pollock and *Gavin Simonds* for the Crown. The money was paid to Baring Bros. as the duly appointed agents of the Russian Government, and the appellants cannot succeed in the absence of that Government: *Twycross* v. *Dreyfus.* (4) It has not been proved that at the crucial date there was no Russian Government in existence which could fulfil its obligations to the appellants. The de facto Government is entitled to be heard as to that.

Bischoff for Baring Bros. submitted to deal with the money as the Court should direct.

A. Grant K.C. in reply. The appellants were right in suing

(1) (1911) 17 Com. Cas. 41.
(2) (1841) 9 M. & W. 54.
(3) (1856) 1 H. & N. 210.
(4) (1877) 5 Ch. D. 605.

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the agents as for money had and received, without bringing in the principals: *Buller* v. *Harrison*. (1)

[He also referred to *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (2)]

LORD STERNDALE M.R. These two appeals raise up to a certain point the same question, but there is one question which is peculiar to the first in order, that of the Steam Saw Mills Company, and does not apply to that of the Archangel Company. During the war the Russian Government regulated the export of timber and other goods from Russia and they only allowed it under licence. The appellants obtained licences to export timber. One of the terms of the granting of the licences was that the exporters undertook to place to the credit of the Chancellerie de Crédit, a department of the Russian Government, money which they received for the timber which they exported. In this case the timber was exported to England and was bought by the British Government. In accordance with the conditions of the licence two sums of 15,000*l.* and 20,000*l.* respectively were paid by the exporters to Baring Bros., who were the bankers for the Russian Government, and the money was placed by them to the credit of the Russian Government. It was part of the agreement between the Russian Government and the exporters to whom they granted licences that when the Russian Government had the sterling placed to their credit they would pay to the exporters the equivalent amount in roubles at a fixed rate of exchange. The object of the transaction, so far as the Russian Government was concerned, was twofold. In the first place to supply the Russian Government with credit in this country, and secondly, as far as possible, to keep the exchange stable. The contract was made in the first instance with the Imperial Government of the Tsar. In March, 1917, the Tsar abdicated; the Imperial Government came to an end and the Provisional Government, or the Kerensky Government as it has been variously called, came into power. On November 7 the Bolshevist Revolution

(1) (1777) 2 Cowp. 565. (2) [1921] 3 K. B. 532.

broke out, and the revolutionaries seized practically all the departments of Government, but the constituent assembly continued to sit until December 13, when it was dissolved, and the Soviet or Bolshevist Government was constituted substantially as it exists at present. When the action was commenced that Government had not been recognized by the British Government, but it was so recognized afterwards.

There are two questions which are common to the two cases. First it is argued that the Russian Government received this money as a conduit pipe to pass it on to the exporters. Perhaps it is more accurate to say, as the agents of the exporters, and merely as a link in the chain by which the money was to pass from the purchasers to the vendors. The learned judge has held that that is wrong in fact, and I agree with him. It was nothing of the sort in my opinion. It was an agreement by which the sterling was placed to the credit of the Russian Government in order that they might use it for their purposes, and, as a consideration for that, or in consequence of that, they agreed to give to the vendors, the exporters, the equivalent of that sterling in roubles at a fixed rate of exchange, but the money did not go to the Russian Government, in my opinion, as the agents of the vendors at all; it went to them for themselves with that liability upon it—namely, to pay to the vendors the equivalent amount of the sterling in roubles at a fixed rate of exchange. Therefore, that first point fails.

The second point, which is also common to both cases, is this. It has been argued on behalf of the appellants that the money was paid on a consideration which has failed, and for this reason they say that the present Russian Government was not one with which they contracted, it is not one which has adopted the liabilities of the Government with which they did contract, and therefore they cannot get what they thought they were going to get when they paid the money to the credit of the Russian Government—namely, the equivalent amount in roubles. I think that is a mistaken view. It was not paid on a consideration that failed. The consideration for the payment of this money to the credit of the Russian

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Government was that the appellants should get a licence to export, and it was a condition of the licence that they should so pay. They got their licence, and they did export. Therefore, in my opinion, that point also fails. That disposes of the case of the Archangel Company.

The case of the Steam Saw Mills Company differs in this way. The money in that case was paid on November 9 and on November 7 the Bolshevist revolution broke out, and when the money was paid no news of that revolution had arrived in this country. The appellants, therefore, say that they paid the money under a mistake of fact, and therefore they are entitled to recover it; the mistake of fact being this, that they did not know about the revolution of November 7, and if they had known it they would not have paid the money. The learned judge, upon the evidence, came to the conclusion that they did not know of the revolution, and that they would not have paid if they had known, and I accept his findings on that point. Then, that being so, the appellants allege that they are entitled, as they have paid under that mistake of fact, to recover the money. No doubt, in certain circumstances, persons who have paid money under a mistake of fact are entitled to recover it from the person to whom they paid it, although he may have received it simply as agent for somebody else, without joining the principal. That is what the appellants claim to do here. They say that as they did not know of the revolution they did not know that the Kerensky Government, with whom the contract was subsisting, had ceased to exist on November 7, and that from that time until December 13 there was no Government of Russia. Therefore, they say there was no person with whom they had any contract to pay this money at all, and that was a fact of which they were ignorant, and it was their ignorance of that fact which induced them to pay the money as they did. There seems to be ample authority for this, that if a person, under a mistake of fact, pays money, which he is not liable to pay, he may recover it back; but it makes all the difference in the world whether the fact of which he was ignorant would have discharged him from the liability

to pay. If the Kerensky Government had continued to exist it is not disputed that there would have been a contractual obligation to pay this money to Baring Bros. on behalf of the Russian Government; but it is said that in fact the Government had ceased to exist, and therefore any liability under which the appellants might have been to pay the money, had gone, and there was no liability on them to pay it at all. I think it is established that if a man pays money under a mistake of fact, there being a liability to pay it, if the fact of which he was ignorant does not discharge him from that liability, he cannot recover it back. The appellants' counsel sought to limit that doctrine in this way; they said that the liability to pay must be a liability to pay for an executed consideration, and that if it be paid under a liability in respect of a consideration that is not executed, the doctrine does not apply. I do not agree with that. I can see no difference whatever, as long as there is a liability to pay, whether it be a liability for an executed consideration or for one to be executed in the future. What we have to consider is whether this was a payment made under a mistake of fact in the absence of any obligation to make it. In order to establish that the plaintiffs must show that the contracting party, at that time the Provisional Government, had ceased to exist.

In my opinion they have failed to show that. What they have shown is that that Government was violently attacked on November 7, and that eventually another Government arose in Russia which ruled Russia upon different principles and in a different manner, but, in my opinion, they have not shown that on November 9, when the money was paid, there had been such an entire destruction of the Russian Government, with which they had contracted, as to make the payment a payment not made under a liability. In my opinion it was made under a liability. Therefore I think that third point, which is peculiar to the Steam Saw Mills Company, fails also.

The only remaining question is, what ought to be done in those circumstances? Naturally, Baring Bros. wish to do

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only what is right with the money. They claim no interest in it at all.

The appellants ask, even if we consider, as I do, that their appeal fails, that the money should remain in Court. It was paid into Court by Baring Bros., and the appellants ask that it should remain in Court, in order that, if any claim should hereafter be made by the Russian Government, the Russian Government would have to come to England to make it, because of course the plaintiffs cannot bring them in. Having disposed of the grounds upon which these actions were brought it is clear, I think, that no decision, as to what ought to be done with this money, can be arrived at in the absence of the Russian Government. I do not know what I might have said with regard to keeping the money in Court. I express no opinion; but it is unnecessary to consider the matter, because Baring Bros. are willing to keep this money, if paid to them, on the terms that they shall not part with it without giving notice to the plaintiffs in those actions, and without an order of the Court. In those circumstances I think it is quite right that it should be handed over to them.

The result is that the appeal fails and will be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. [His Lordship stated the facts and continued:] The main contention, applicable to both cases, was, first, that the Russian Government in the transaction acted as exchange brokers, or, to use a figurative term, as a mere conduit pipe for the purpose of passing the sterling paid in London to the exporters in Petrograd in the shape of roubles, and that, if that were so, inasmuch as no roubles have been paid in respect of the two sums in question, the appellants are entitled now to recover those sums. Secondly, the appellants contend that the two sums were paid on a consideration which has wholly failed, and that, on that ground also, they are entitled to recover the money. With regard to the first of those contentions, I agree with Lawrence J. that the plaintiffs' case

fails on the facts. The evidence which was adduced by the plaintiffs establishes that the true nature of the transaction was that the sterling was to be paid to the Russian Government here in London, in order to create assets in London, by the aid of which the Russian Government might purchase goods here, and so keep up the exchange, and that, when the money was so paid, it became the property of the Russian Government, and the plaintiffs retained no interest in it, either in the nature of lien or otherwise, but they paid it absolutely out and out to the Russian Government, and took from the Russian Government in exchange an obligation to pay the corresponding amount in roubles in Petrograd. That contention, therefore, of the plaintiffs, fails. With regard to the second contention, that the payment was made for a consideration which has failed, that also is incapable of support. The money was paid, not in consideration of the obligation by the Russian Government to pay the roubles in Petrograd, but in satisfaction of one of the terms in consideration of which they obtained their licence to export. They obtained their licence to export, and, therefore, the consideration has not failed.

That disposes of the claim of the Archangel Company. The Steam Saw Mills Company, who paid their money on November 9, 1917, make an alternative case of this nature. They say that on November 9 there was in fact no Government in existence in Russia towards whom they were under any obligation to make that payment, that the payment, therefore, was in fact made voluntarily, that there had happened in Russia circumstances of which they were not aware, which, if they had been aware of them, would have prevented them from making the payment, and that therefore they are entitled to recover from Baring Bros. on the footing that they made the payment to them under a mistake of fact. If the plaintiffs had succeeded in establishing that they had made the payment in fulfilment of a supposed obligation, which obligation did not in fact exist; and that if they had known that the obligation did not exist, they would not have made the payment, then I think they would have been entitled,

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on the authority of *Kerrison* v. *Glyn, Mills, Currie & Co.* (1), to recover. But, in my opinion, this contention also fails on the facts. What happened was this. On November 7 there broke out in Petrograd violent riots and disturbances, as the result of which many of the officials of the then Russian Government, including those of the Chancellerie de Crédit, were either driven from their posts, or were killed, or fled, and ultimately on December 13, those who had instigated these riots and disturbances succeeded in displacing the then Government of Russia and instituting in its place a Government by the Soviet of soldiers and workmen; and they did so eventually by forcibly dissolving the constituent assembly, which had, up to that time, been operating in Russia. But, in my opinion, on November 9, when the money was paid, the complete destruction of the Provisional Government had not taken place. At that time there were people who were striving to displace it, but the Government had not actually been displaced, although its officials, or many of them, were, owing to the violence which had been displayed, unable or unwilling to perform their duties. It seems to me, therefore, that the money was paid, not under a mistake of fact as to the existence of an obligation; it was paid in pursuance of an obligation which in fact existed. It may well be that if the plaintiffs had known what was happening in Russia they would not have fulfilled their obligation, but that is not sufficient. If there was in fact an obligation, and no mistake as to the existence of that fact, then the money cannot be recovered on the ground that there was a mistake of fact.

I agree with what the Master of the Rolls has said with regard to the alleged distinction between money paid on an executed consideration and money paid on a consideration which has not been executed. In my judgment no such distinction arises. If the money was paid under an obligation of any kind, then that is sufficient. That being so, the judgment of Lawrence J. dismissing the action was, in my opinion, correct and this appeal ought to be dismissed.

(1) 17 Com. Cas. 41.

Then it was said by the appellants, that although the action is dismissed, the money ought to remain in Court in order that, if the Russian Government desires to get it, it may be compelled to come to this country for that purpose. I feel grave doubts whether, in a case of this kind, the money ought to be retained in Court. The action is not one for the administration of a fund. The claim in each case is for definite relief—namely, for a declaration that the plaintiffs are entitled to a certain sum of money and for repayment of that sum to them. On judgment being given for the defendants there is an end of the action. I have grave doubts whether under those circumstances it is in accordance with the practice to keep the money in Court, but I need express no definite opinion on that matter, inasmuch as Baring Bros. are willing to undertake that the money shall not be paid to the Russian Government except after notice to the plaintiffs and in pursuance of an order of the Court. The result is that the appeal should be dismissed with costs.

YOUNGER L.J. I have no doubt that both these appellants were under an obligation, for at least a partially executed consideration, to sell in England in sterling to the Russian Government moneys representing the proceeds of sale of timber exported by them to this country from Russia, under licence from the Russian Government. One of the attendant terms of the licence imposed upon the exporters an obligation to make that sale of sterling to the Russian Government in England, and in pursuance of that obligation to pay to designated bankers in London, as the agents here of the Russian Government and for the credit of that Government, those sums, against the payment to themselves, the exporters in Petrograd, by the same Government of the equivalent amount in Russian roubles at a previously agreed rate of exchange. There can, I think, also be no doubt that the payment of the 15,000*l.*, the first payment here in question, was made on behalf of the appellants, the Archangel Company, to Baring Bros. as the agents of the Russian Government, in pursuance of that

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obligation, and in circumstances which even as now ascertained show in these appellants no clear even prima facie right to have that money back, either from Baring Bros. or from the Russian Government, if it were here to resist their claim. The appellants have, however, not received from any Russian Government roubles of the equivalent agreed value, or of any value. They have therefore in respect of that payment of 15,000*l.* a claim against some Russian Government for compensation, and it seems to me that this Court, in the very exceptional circumstances of this case, is quite entitled, in order that it may see full justice done to the parties, and also, as it has this sum of 15,000*l.* still under its control, to impose such terms as to dealings with that sum as will, at all events, prevent any Russian Government obtaining payment of it for itself without doing justice to the appellants in respect of their claims arising from the transaction. As to the payment of the 20,000*l.*, the second sum in question, it was made to the bankers on behalf of the Steam Saw Mills Company in supposed performance of the same obligation binding upon them. In respect of that payment these appellants have, however, attempted to prove that at the moment when it was made, although they did not know it, there was no Russian Government actually in being in a position to empower Baring Bros. to give for that sum a receipt on its behalf. In any case they say further that there was not at that moment in Russia, and there has so far perhaps never since been any Government there which either could if it would, or would, if it could discharge to the appellants on the payment in sterling being made, its obligation to hand over to their credit, at Petrograd, the equivalent amount of roubles previously arranged for.

I agree with the other members of the Court that the first of these contentions has not in fact been established in these proceedings with sufficient clearness. Had it been so established, I think these appellants might have been in a position to maintain their action in respect of the 20,000*l.*, even although no representative of the present or any Russian Government is a party to these proceedings.

The second contention of these appellants, however, cannot, in my opinion, be maintained or adjudicated upon in the absence of that Government, and the objection to their claim on this second head was the main objection insisted upon by the Attorney-General. But it cannot, I think, be said that these appellants have made no case under this head. It is reasonably plain, whatever be the constitutional position, that the Kerensky Government had no executive power at any relevant date to pay out roubles in respect of that sterling payment made in London, and it is perhaps not less probable that the revolutionary Government, not being recognized here, had no interest in possessing any credit in sterling in London which would be sufficient to induce it to hand out roubles, in consideration of that credit, in Petrograd. Accordingly it cannot be said that in the presence of the Russian Government the appellants may not be able even to establish that, at the moment when they, in ignorance of the true position in Russia, paid this 20,000*l.* to Baring Bros., they were, had they known it, free from any obligation at all to make it. I say nothing now as to the result in law which would follow the success of such a contention on their behalf in this Court in the presence of that Government or its representatives. All I do say is that there is in the interests of justice even a greater necessity, that the Court should place such a fetter upon the disposition of this 20,000*l.* also, as that it will not be paid to any one, and particularly not to any Russian Government, without notice to the plaintiffs and an order of the Court. Baring Bros. have offered an undertaking with respect to both sums in those terms, and it appears to me that with that undertaking the appellants receive at the hands of the Court the maximum relief to which in these proceedings they have shown themselves to be so far entitled.

Appeals dismissed.

Solicitors for the appellants: *Arthur Benjamin & Cohen.*
Solicitors for the respondent bank: *Bischoff, Coxe & Co.*
Solicitor for the Crown: *The Treasury Solicitor.*

G. A. S.

SARGANT J.

1921

Oct. 25; *Dec.* 20.

In re SOCIÉTÉ CHIMIQUE DES USINES DU RHÔNE'S PATENT.

[1921. S. 3174.]

Patent—Extension—Loss or Damage by reason of Hostilities—Failure to manufacture in United Kingdom—Satisfactory Explanation of Non-working—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18—*Patents and Designs Act*, 1919 (9 *& 10 Geo.* 5, *c.* 80), *s.* 7, *sub-s.* 3.

By s. 7, sub-s. 3, of the Patents and Designs Act, 1919, it was provided that at the end of s. 18 of the Patents and Designs Act, 1907, the following sub-section should be added: "(6.) Where by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage, ... an application under this section may be made by originating summons, ... and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee: . . . ."

On an application for an extension of a patent under this provision, in which it was shown that loss or damage had been suffered by the patentee by reason of hostilities, it appeared that the patented article had never been manufactured in the United Kingdom, but that as a matter of ordinary business success any attempt to manufacture in the United Kingdom would have been foredoomed to failure:—

Held, that although on an application for an extension under s. 18 of the Act of 1907 as unamended the failure to manufacture would have been a grave objection to granting an extension, it was far less material in an application seeking an extension under the new sub-section when the extension was in the nature of a substitution for part of the original term of the patent which had been rendered valueless by reason of hostilities; and accordingly, that for this reason and having regard to the satisfactory explanation given by the applicants of their failure to manufacture in the United Kingdom, an extension ought to be granted.

By letters patent dated January 5, 1906, and numbered 29,554, the Société Chimique des Usines du Rhône (hereafter called the company) patented a form of closure for tubes and vessels charged with volatile liquids or liquids under pressure, which was more particularly devised for application to glass tubes charged with ethyl chloride employed for producing local anæsthesia, and had in practice only been so applied by the applicants.

On January 17, 1921, the company took out a summons claiming that by reason of the war they had suffered loss and damage and asking for an order under s. 18 of the Patents

and Designs Act, 1907, as amended by s. 7, sub-s. 3, of the Patents and Designs Act, 1919, that the term of their patent should be extended for a further term of five years, or for such other term as the Court should think fit, having regard to the loss or damage suffered by the company.

The patented articles had never been manufactured in the United Kingdom, but their manufacture had been started by the company in 1906 at their works in France and Switzerland, and the demand in the United Kingdom supplied by importing. The manufacture at the works in France continued till the commencement of the war in 1914, when the works became and remained during the war entirely occupied under the supervision of the French Government with the manufacture of ingredients for explosives and of asphyxiating and mustard gases. At the Swiss works the manufacture continued until the end of 1915, when all the raw material in hand had been exhausted and no more could be obtained for reasons connected with the war, and particularly because of the prohibition by the United Kingdom of exports of rubber.

When the summons first came on for hearing Sargant J. ordered the case to stand over in order that evidence might be filed giving reasons for the failure to manufacture in the United Kingdom. An affidavit was accordingly made by an officer of the company which was briefly as follows :—

The company were desirous of supplying the patented articles at the lowest possible price, but the price at which the patented articles and their contents (for it was not possible to regard the tubes and their contents as separate articles of commerce) could be sold depend, first, upon the scale upon which chloride of ethyl was being made at or near the place where the glass vessels were filled and, secondly, upon the possibility of obtaining glass vessels of a sufficiently high quality at a reasonable price. The company could not undertake to manufacture in the United Kingdom because of : (1.) the impossibility of disposing there of the large quantities of industrial chloride of ethyl necessary to keep the price at a level which made its production and sale commercially

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possible, and (2.) the practical non-existence in the United Kingdom of an industry making chemical glass of the nature required for use with the patented articles. The demand for highly-purified chloride of ethyl was strictly limited and it could only be produced as an article of commerce in works where quantities of industrial chloride of ethyl were produced. This industrial chloride of ethyl was either used by the applicants in processes carried on at their own works or sold to manufacturers of dyestuffs, and owing to the absence of any considerable manufacture of dyestuffs in the United Kingdom there was no sufficient demand for industrial chloride of ethyl to justify its manufacture there as a commercial venture.

The transport of chloride of ethyl in bulk was a matter of extreme difficulty, as it boiled at a very low temperature and decomposed on contact with metal so that it had to be sealed up in glass vessels immediately after its production. Before the war the making of glass for chemical purposes was hardly carried on at all in Great Britain, and neither manufacturers nor workmen then had the necessary experience to enable them to make the glass tubes or vessels in which the chloride of ethyl was put up for sale. The expense of starting to make such glass in England, involving as it would have done the bringing in of a supervisory staff and skilled workmen from abroad, would have been prohibitive. Even had it been possible to produce the glass vessels in England, they would have had to be sent abroad to be filled, and this would have involved the payment of freight and the risk of loss from breakages as well as the payment of an import duty on bringing the tubes into France.

It was in evidence that no request for a licence to use the company's invention had ever been made by any manufacturer in the United Kingdom, and that before the hearing of the present application the Comptroller had, at the applicants' request, caused the patent to be endorsed "licences of right" under s. 2 of the Patents and Designs Act, 1919.

Byrne for the applicants. An extension of the patent is sought on the ground that loss or damage has been suffered

by the patentees by reason of hostilities within the amendment to s. 18 of the Patents and Designs Act, 1907, made by s. 7, sub-s. 3, of the Patents and Designs Act, 1919. (1)

On an application under the new sub-section it is immaterial that the patented article has not been manufactured in this country. The main consideration for the Court is whether the patentees have suffered loss or damage by reason of the war and it has a discretion to disregard considerations to which it is bound to have regard by virtue of s. 18, sub-s. 4: *In re Davidson's Patents.* (2)

[SARGANT J. Has an extension ever been granted where a patent has been worked entirely outside the United Kingdom ?]

In re Hughes' Patent (3) is the only reported case and that was of a very special nature. There is clear evidence here of loss owing to the war. No objection has ever been taken to the patent under ss. 24 or 27 of the Patents and Designs Act, 1907, or s. 1 of the Act of 1919. Even if there had, the Comptroller would have to consider whether the failure to manufacture in the United Kingdom had been satisfactorily explained: *In re Hatschek's Patents* (4), when ss. 24 and 27

(1) Patents and Designs Act, 1907, s. 18: "(1.) A patentee may, after advertising in manner provided by rules of the Supreme Court his intention to do so, present a petition to the Court praying that his patent may be extended for a further term. . . . ."

"(4.) The Court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case."

"(5.) If it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven or, in exceptional cases, fourteen years. . . . ."

Patents and Designs Act, 1919, s. 7: "(3) At the end of the same section [s. 18 of the Act of 1907] the following sub-section shall be added:—

"(6.) Where by reason of hostilities between His Majesty and any foreign State, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities), an application under this section may be made by originating summons . . . . and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee: . . . ."

(2) [1921] 1 Ch. 69, 75.

(3) (1879) 4 App. Cas. 174.

(4) [1909] 2 Ch. 68.

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were considered. These sections have now been modified by the Patents and Designs Act, 1919, ss. 1 and 2.

The evidence that has been filed shows that there were good reasons for not attempting to manufacture in the United Kingdom—namely, that it was impossible from a practical point of view to do so. There have been no applications for licences to manufacture in this country and the patent has now been endorsed "licences of right." Under s. 7, sub-s. 3, of the Act of 1919 there is no obligation to consider the interests of the public as under s. 18 of the Act of 1907. The bearing of non-manufacture on applications under s. 18 was considered in *In re Johnson's Patent* (*No.* 2) (1) and *In re Poulsen's Patent.* (2) Even in order to obtain an extension under the original section, the patentee would, it is submitted, only have to show a reasonable excuse for non-working, and the evidence here is definite that to manufacture in this country with financial success was impossible. This case is, however, stronger, because the extension under s. 7, sub-s. 3, of the Act of 1919 is not an absolute extension of the benefit of a monopoly that has been enjoyed already for the full period, but an extension by way of substitution for a period in the original term rendered valueless by the war.

Dighton Pollock for the Comptroller. The only possible objection to this application is the failure to manufacture in this country. That would be a grave objection on an ordinary application under s. 18. The Comptroller does not desire to resist this application if the Court is satisfied.

SARGANT J. The applicants are patentees who hold an English patent in respect of a form of closure for tubes or vessels charged with volatile liquids or liquids under pressure. That patent dates from January 5, 1906, and would therefore expire in January next. There is quite clear evidence that the result of the war was to prevent the patentees from importing into this country and selling a very large proportion of the articles they had been accustomed to import and sell by virtue of their patent rights. The case therefore is one which

(1) [1909] 1 Ch. 114. (2) (1913) 30 R. P. C. 597.

is prima facie appropriate for the grant of relief under the sub-section added to s. 18 of the Patents and Designs Act, 1907, by virtue of s. 7, sub-s. 3, of the Patents and Designs Act, 1919.

But when the case was before me in October I felt some doubt whether I ought to grant the proposed extension, seeing that it appeared on the face of the evidence that throughout the whole period of the patent the manufacture of the patented articles had taken place exclusively abroad and that no attempt had been made to manufacture in the United Kingdom. Accordingly I allowed the application to stand over for evidence to be filed explaining this circumstance, which prima facie told against the extension of the term.

I may say that with regard to an extension asked for under s. 18 of the Act of 1907 as it originally stood, my inclination would be very strongly opposed to granting an extension when the patented article had throughout been manufactured exclusively abroad. I do not say that there is no case where an extension might not still be justified, but I have as a matter of fact been referred to one reported case only in which an extension was granted in such circumstances. That was *In re Hughes' Patent* (1) and it was a very peculiar case. It is obvious that if one of the objects of granting a patent is, as expressly stated in s. 1 of the Patents and Designs Act, 1919, "to secure that new inventions shall so far as possible be worked on a commercial scale in the United Kingdom without undue delay," it must be a circumstance almost, if not quite, fatal to an extension in the ordinary way of the term of a patent that it has never been worked in this kingdom.

Here, however, what is sought is not an ordinary extension but an extension by way of quasi-substitution under the new sub-section. That sub-section empowers the Court to take into account the fact that part of the original term of a patent has been rendered ineffective by reason of the war; and although it in terms provides for extending the patent it really allows the Court to grant a substitutional term in lieu of an ineffective portion of the original term. And further the

(1) 4 App. Cas. 174.

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Court is by the express words of the sub-section empowered to have regard solely to loss or damage suffered by the patentee owing to the war. It seems to me that although the failure to manufacture a patented article in the United Kingdom would be a strong objection to granting an extension of the patent in the ordinary way, it is not an objection to anything like the same degree to an extension of the patent which is really only by way of substitution.

However that may be, the applicants as a result of the adjournment have put in further evidence which in my judgment has satisfactorily explained the failure to manufacture or to attempt to manufacture the patented article in the United Kingdom. I need not go into the particular circumstances, but I think the evidence shows that as a matter of ordinary business or commercial success an attempt to introduce the manufacture into the United Kingdom would have been foredoomed to failure. It would have involved the exportation and importation of chemical glass, and it would probably have involved setting up a very much larger manufacture of chloride of ethyl, in order to obtain the comparatively small portion of pure chloride of ethyl used in the manufacture of the substance for filling the bottles fitted with the patented closure. The evidence shows, too, that it would have been commercially impracticable to set up this larger manufacture in the United Kingdom.

Accordingly, I have come to the conclusion that the failure to manufacture in this country has been satisfactorily explained, and that it ought not to be a bar to the relief that I should otherwise have granted to the applicants; and therefore I extend the patent for the period of four years to replace the loss of the benefit of an equivalent period during the progress of hostilities.

Solicitor: *G. B. Ellis; Solicitor to Board of Trade.*

H. C. G.

KENNARD *v.* CORY BROTHERS AND COMPANY, LIMITED.

SARGANT J.

1921

Nov. 4, 11 ; *Dec.* 21.

[1916. K. 625.]

Injunction — Nuisance — Negligence — Landslide — Remedial Works — Damages — Liberty to apply in Case of apprehended Danger — Maintenance of remedial Works — Mandatory Injunction.

Under a licence of the plaintiffs the defendants, a colliery company, tipped refuse on the side of a mountain on land belonging to the plaintiffs. The defendants so tipped as to give rise to a landslide causing injury to the plaintiffs' buildings. In the course of the action brought by the plaintiffs an order was made by consent for the execution of remedial works consisting mainly of drainage to prevent any further slide, the works to be paid for ultimately by the unsuccessful parties. The plaintiffs succeeded in the action and obtained a declaration that the landslide was caused by the acts of the colliery company and that the company were liable to the plaintiffs for all damages sustained or thereafter to be sustained by them by reason of the movement or any recurrence or continuation thereof ; a perpetual injunction to restrain the defendant company from any further tipping to the prejudice of the plaintiffs ; and an inquiry as to any damages sustained by the plaintiffs by reason of the defendant company's acts. Liberty was also granted to the plaintiffs to apply in case of apprehended damage for a mandatory injunction to compel the defendant company to do and execute such works as might be necessary (inter alia) to keep open the remedial works. Part of the remedial works being out of order the plaintiffs moved in the action for a mandatory injunction to compel the defendants to restore the works to order :—

Held, (1.) that the estimated costs of maintaining the remedial works for ever were not recoverable against the defendants under the inquiry as to damages ; and (2.) that, although the Court never made a mandatory injunction for the execution of a series of successive operations, it could and ought to grant a mandatory injunction compelling the execution of the specific work required to remedy the existing defect in the remedial works. It was not a valid ground of objection that this order would form a precedent for similar future orders, should the defendants fail in their duty of maintaining the remedial works.

MOTION.

The following statement of facts is substantially taken from the judgment of Sargant J. :—

This is a motion in the second of two actions brought in respect of damage and apprehended damage from the slide of a tip or tips made by the defendant company, Cory Brothers & Co., Ld., on the slope of a mountain by the

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Rhondda Valley in South Wales. The first action was one by the Attorney-General on the relation of the Rhondda Urban District Council who were desirous of protecting a highway along the valley which was vested in them and also a tramway and works in connection with that highway. The second action was brought by the present plaintiffs, the trustees, and some of the beneficiaries of a settled estate known as the Crawshay-Bailey Estate, which comprises lands and buildings on the mountain side just below the tip which were seriously damaged by the slide, and were threatened with further damage. In both actions the main relief sought was by way of injunction against apprehended damage, though in each action, and particularly in the second one, there was also a claim for damages. The main defence of the defendants in both actions was that the slide in question was due entirely to natural causes, and had not been caused, accelerated or aggravated by the tips in question. But in the second action there was a further defence that in any case the tips had been authorized and licensed by the plaintiffs as owners of the Crawshay-Bailey Estate which comprised the site of the tips and accordingly that the plaintiffs on that ground also had no sustainable cause of action against the defendants.

At an early stage in the actions it was apprehended by the plaintiffs that a further slide or slides might take place, and motions were made to obviate this danger and were heard by Younger J., and by an order made by consent in the action it was directed that certain remedial works should be carried out under the direction of an engineer, Mr. Walter Young Armstrong, at the joint cost of the plaintiffs and the defendant company, and should ultimately be paid for by the party or parties found to be in the wrong on the hearing of these actions. The remedial works, which consisted in the main of drainage works both above and below the tips, were in fact so carried out shortly after the making of the order.

I found for the plaintiffs in both actions; and by the judgment dated July 31, 1918, in the second action the following relief was granted—namely: It was declared that

the movement in question of part of the Pentre Mountain was caused by the acts of the defendant company and that they were liable to the plaintiffs for all damage sustained by them or which might thereafter be sustained by them by reason of the said movement or by reason of any recurrence or continuation of such movement; a perpetual injunction was granted to restrain the defendant company from any further tipping to the prejudice of the plaintiffs; an inquiry was granted as to any damages sustained by the plaintiffs by reason of the acts of the defendant company; and liberty was granted to the plaintiffs to apply in case of apprehended damage for a mandatory injunction to compel the defendant company to do and execute such works as might be necessary to protect permanently the plaintiffs' buildings or otherwise to abate the nuisance caused by the acts of the defendant company or to keep open the present works, that is to say, the remedial works above referred to.

Both judgments were reversed on appeals to the Court of Appeal, but were subsequently restored on further appeals to the House of Lords. (1) Since then the inquiry as to damages ordered in the second action has been proceeding and is not yet concluded.

The present motion is launched under the liberty to apply reserved in the second action, and asks in terms for a mandatory injunction to compel the defendants to execute such works as may be necessary permanently to protect the buildings and other erections of the plaintiffs on the mountain side in the judgment mentioned or otherwise to abate the nuisance caused by the acts of the defendants or to keep open the present works thereon and therein, that is, the remedial works which have been constructed in accordance with the order. At the Bar, however, counsel for the applicants did not ask for more than that the defendants shall be asked to remove certain obstructions which had been caused to a small part of the remedial works and so restore these works to their proper condition of efficiency.

The lease dated December 31, 1892, from the Crawshay-

(1) [1921] 1 A. C. 521.

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Bailey trustees to the defendants under which the tipping had been effected had expired on December 31, 1916, and a new lease dated February 25, 1920, was granted to the defendants for a term of forty-eight years from January 1, 1917. This lease contained a demise of the beds, veins and seams of coal underlying part of Church Farm in the parish of Rhondda (in the lease called "the described lands") and (clause 4) of liberty "at all times during the said term to continue to use the existing colliery lands for such general colliery purposes as are hereinafter authorized but not otherwise and without making any further payment therefor." Clause 1 contained a definition of "the existing colliery lands," which included the site of the tips. By clause 6 there was granted "full and free liberty to search for win work carry away raise and make marketable the demised minerals (*a*) and for those purposes or any of them into all or any part of the described lands to enter . . . . (*b*) and for the aforesaid purposes or any of them to . . . . form maintain and use such . . . . spoil heaps tip room for depositing minerals and rubbish whether gotten from out of the demised mines or from adjoining mines and other conveniences as may be necessary or convenient." The described lands included the whole area of the remedial works and clause 24 of the lease provided for payment of 60*l.* per acre "of the described lands other than the existing colliery lands which shall be entered upon by the tenants under the liberty in that behalf hereby granted."

Romer K.C. and *MacSwinney* for the plaintiffs. The plaintiffs are entitled to a mandatory order compelling the defendants to put right the existing defect in the remedial works. It is essential that these works should be maintained if a further landslide is to be prevented. The Court has jurisdiction to grant a mandatory order compelling the defendants to do work on the plaintiffs' property: *Goodson* v. *Richardson* (1); and compare *Belvedere Fish Guano Co.* v. *Rainham Chemical Works.* (2)

(1) (1874) L. R. 9 Ch. 221. (2) [1920] 2 K. B. 487; [1921] 2 A. C. 465.

Tomlin K.C. and *Topham* for the defendants. The lease under which the tippings were effected has determined and under the new lease dated January 1, 1917, the defendants are not in occupation of their site or of the surface of the land where the remedial works are. Since then the plaintiffs or their farm tenants have been in occupation of the land and the defendants have no more than an option to use the land if they should think fit on paying an additional rent. In the circumstances the defendants are under no further responsibility for damage caused by the tips: *Attorney-General* v. *Cory Brothers & Co.* (1)

Again the plaintiffs' action for negligence against the defendants rested solely on damages. The plaintiffs obtained an injunction and an inquiry as to damages, which is now proceeding. That award of damages exhausts the plaintiffs' claim in respect of the landslide that has taken place. It is an element of the damage to the plaintiffs that they will have to maintain remedial works on their land to prevent a further landslide. The proper remedy of the plaintiffs therefore is to include in their damages an amount in respect of the burden of maintaining the remedial works for ever: see Mayne on Damages, 8th ed., p. 124.

[SARGANT J. referred to *Darley Main Colliery Co.* v. *Mitchell.* (2)]

Further the Court here is being asked for ever hereafter to supervise the maintenance by the defendants of works on the plaintiffs' land intended to safeguard the plaintiffs from damage. The Court will not order the execution of a series of successive operations the carrying out of which it cannot effectually supervise: *Earl of Harrington* v. *Derby Corporation.* (3) No doubt the Court could at the trial have ordered the defendants to execute these remedial works, if they had not been executed by agreement between the parties. It is a different matter to say that the Court would make an order on the defendants for their maintenance for ever. The Court will not grant a perpetual mandatory injunction: *Attorney-*

(1) [1921] 1 A. C. 521, 539. (2) (1886) 11 App. Cas. 127.
(3) [1905] 1 Ch. 205.

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General v. *Staffordshire County Council* (1); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (2)

[SARGANT J. The plaintiffs are not asking for a perpetual mandatory order but for an order that the defendants should remedy a particular defect.]

But a right will follow to come for a similar order whenever the works develop a defect. On all these grounds a mandatory injunction ought not to be granted.

MacSwinney in reply. The defendants' arguments amount to asking the Court to read out of the order in the action the liberty to apply. To say that the whole matter is covered by the inquiry for damages is to ignore the liberty to apply.

[He also referred to *Thompson* v. *Gibson*. (3)]

Cur. adv. vult.

1921. Dec. 21. SARGANT J. [after stating the facts and that the plaintiffs at Bar asked only for an order upon the defendants to remove certain obstructions in the remedial works continued:] It appears that a manhole leading to the mouth of a drain referred to as B B in the evidence has become clogged with debris, and that this drain is no longer in working order. And to restore the efficiency of this part of the drainage system it is necessary that these defects should be remedied. Mr. Armstrong, an experienced engineer, who originally constructed the remedial works, and whose opinion I adopt, puts the matter thus in paras. 9 and 10 of an affidavit filed on November 1 last—namely: "(9.) The remedial works have now been in existence for over three years, and have fully answered their purpose and there is no evidence that these works are not sufficient or that any further works are required or necessary. (10.) In my view if the manhole referred to at the point B on the plan is cleared and the drain from B to B put in working order the remedial works will be restored to the efficient state in which they were before the blocking of the drain took place."

(1) [1905] 1 Ch. 336, 342. (2) (1874) L. R. 9 Ch. 331.
(3) (1841) 7 M. & W. 456, 461.

As regards the consequences to be apprehended from the manhole and drain in question not being kept in working order, it is not alleged that the danger is imminent or a matter of weeks or months. But there appears to be general agreement that the remedial works were necessary, and that it is essential that they should be kept in order if further damage is to be averted. Sir Maurice Fitzmaurice in para. 3 of an affidavit filed on August 16, 1921, says this : "Referring to the remedial works which were undertaken under an order made at an early stage of the proceedings the whole success of these works possibly for some years to come will in my opinion depend on keeping open the drains which were made for the purposes thereof." And Mr. Jenkins the defendants' surveyor practically admits the plaintiffs' position in the following passage from para. 2 of an affidavit, filed on November 1 last : "I am satisfied that the remedial works have permanently remedied the landslide and that no further movement has taken place or may be reasonably expected to take place in the future if the drainage works are periodically observed and cleaned. The remedial works require inspection at intervals of about once a month and any slight repair that may be found necessary should be effected." It is also obvious that there is no difficulty in carrying out the work demanded by the plaintiffs and that the cost of executing it would be trifling. But the defendants treat the present demand of the plaintiffs as being of the nature of a test case, and object on principle to the granting of the relief applied for ; and it is from this point of view that I have to deal with the plaintiffs' application.

As I understand the defendants' position it is this. They do not dispute the jurisdiction of the Court to make such an order as asked, and that although the remedial works are on the land not of the defendants but of the plaintiffs : *Goodson* v. *Richardson* (1); they do not dispute that the Court might at the hearing have ordered the construction of precisely the same remedial works as those which were constructed by agreement between the parties after the motion. But they

(1) L. R. 9 Ch. 221.

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say that it is quite a different thing to order the defendants from time to time to keep the remedial works open, since that might be equivalent in effect to an order to maintain them in perpetuity, and the Court will not order a series of successive operations the carrying out of which it cannot effectually supervise. *Earl of Harrington* v. *Derby Corporation* (1); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (2) They further say that on the true construction of the judgment the plaintiffs are entitled to prove for and recover as damages a capital sum representing the estimated aggregate cost of keeping the remedial works in order both in the past and in the future, and that this is a more convenient method of dealing with the matter. And finally they say that the position of the defendants has been completely changed as regards the site of the tips in question, since the tips were formed while the defendants were lessees from the plaintiffs under a lease which expired at the end of the year 1916, while they now hold under a new lease granted on February 25, 1920, for a new term running from January 1, 1917.

I will deal with the last point first, though it does not seem to me of much importance having regard to *Thompson* v. *Gibson* (3); and see *Belvedere Fish Guano Co.* v. *Rainham Chemical Works* (4) as affirmed in the Court of Appeal. My view as to the previous position of the defendants in regard to the site of the tip was expressed in a passage of my judgment which is to be found at p. 1538 of the 3rd vol. of the Appendix in the proceedings in the House of Lords, and runs as follows: "Under the terms of the lease the position of the lessees with regard to land tipped on was either that they had the occupation thereof, or at least that they had an exclusive easement over it. For these purposes surface land taken for tipping seems to me substantially in the same position as surface land taken for the purpose of a tramway under the lease. This being so, I do not think that the Crawshay-Bailey Trustees were in such a position in regard to the land tipped on as to render them liable merely as occupiers or as

(1) [1905] 1 Ch. 205.
(2) L. R. 9 Ch. 331.
(3) 7 M. & W. 456, 461.
(4) [1920] 2 K. B. 487, 500, 501.

owners in occupation": see *White* v. *Jameson* (1) and cases there cited. Now under the new lease of February 25, 1920, the demise from January 1, 1917, includes these words: (Clause 4) "And at all times during the said term to continue to use the existing colliery lands for such general colliery purposes as are hereinafter authorised but not otherwise and without making any further payment therefor"; the phrase "the existing colliery lands" is defined in clause 1 so as to include the site of the tips; "general colliery purposes" clearly include the purposes mentioned in clause 6, which comprise maintaining and using spoil heaps and tip room for depositing minerals; and there is a provision in clause 24 that the lessees are to pay the sum of 60*l.* per acre of the described lands other than the existing colliery lands, which should be entered upon by the lessees under the liberty in that behalf thereby granted. In view of these provisions it is clear that the existing lease did not as regards the site of the existing tips merely grant to the defendants an option or right of user if they should think fit to exercise it at an additional rent of 60*l.* an acre, but confirmed and continued the existing occupation or exclusive easement which they had previously enjoyed under the previous lease. In my opinion, therefore, the position of the defendants as regards the tips in question is the same as it was at the date when the tips were formed and the slide took place, and it is they who are still responsible in respect of that site for any damage occasioned by the instability of the tips.

Now as to the interpretation of the inquiry as to damages directed by the judgment. It may be quite true that the liberty to apply reserved by the judgment does not involve the proposition that every application within the term of the liberty must necessarily meet with success. But on the other hand the terms of the liberty to apply cannot be disregarded in construing the meaning of the other parts of the judgment, including that part which directs an inquiry as to damages, and are at least an indication that the damages to be assessed are not to include damages caused

(1) (1874) L. R. 18 Eq. 303.

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by such a subsequent movement as is designed to be prevented by an application under the liberty. And further the terms of Order XXXVI., r. 58, which extend the assessment of damages by providing that they shall be assessed down to the time of assessment, indicate in the clearest way that under the inquiry as to damages directed by this judgment it would not be permissible to take into account the capitalised present value of the expenses that would probably be involved in the future in keeping the remedial works in order. And, therefore, the alternative remedy which the defendants suggest should be sought by the plaintiffs is not, in my opinion, available for them under the judgment.

Lastly, as to the objection to making a mandatory order of this kind at all. There are no doubt objections to ordering a continuous series of operations which the Court cannot supervise. But what is sought here does not, in my judgment, answer this description. The work to be done is quite specific and definite, and no real difficulty can be reasonably apprehended in ascertaining whether the defendants have complied with such an order or not. True it is that this order would be a precedent for other orders of the same kind, should occasion arise through the default of the defendants in performing their simple and obvious duty of preventing the artificial "wild beast" they have created from endangering the property and buildings of their neighbours, the plaintiffs. But it will only be a precedent for directing the execution by the defendants of works which can be clearly defined and the execution or non-execution of which can be readily ascertained. Should there arise in the future a situation in which there are greater difficulties in this respect, the matter can be considered de novo in the light of the new facts.

The defendants appear to have somewhat ignored the fact that the part of the judgment to the execution of which they are now objecting was framed out of a consideration for their interests, and to avoid casting upon them a burden greater than was absolutely necessary for the reasonable protection of the plaintiffs. The Court might well have directed that the defendants should do works, to be ascertained

if necessary by the report of some engineer appointed for the purpose, which would have the result of rendering the tips permanently innocuous apart from any continuing process of maintenance or repair. And this course might have involved the removal of large portions of the tips, or otherwise involved an enormous immediate expenditure on the part of the defendants. Instead of this the much milder form of relief was granted which was embodied in the present judgment. And in the elaborate objections which were taken to the judgment in the two superior Courts I cannot find any trace of any complaint by the defendants of that aspect of the judgment of which they are in effect now complaining.

Some discussion took place as to whether if damage were caused by a future slide this would give the plaintiffs a new cause of action within *Darley Main Colliery Co.* v. *Mitchell.* (1) But the main relevance of this was for the purpose of considering whether the damages given by the present judgment covered the future as well as the past. And for the reasons already stated I am of opinion that the inquiry as to damages cannot extend beyond the date of assessment even if a fresh slide would give no new cause of action. For any other purpose it seems to me immaterial to consider whether the principles of *Darley Main Colliery Co.* v. *Mitchell* (1) do or do not apply. The question here is one not of damages but of injunction. There has been no substantial change in the physical condition of the tips and the slide since the judgment was given, or indeed (apart from the remedial works) since the issue of the writ in this action. And the injunction now sought is based on precisely the same cause of action which formed the basis of the original claim, the order made by consent on motion and the judgment of July 31, 1918—namely, the damage caused by the existing slide and the danger to the plaintiffs' buildings of any further slide of the defendants' tips. Accordingly I grant an injunction to compel the defendants to restore the remedial works by clearing out the manhole at the top of the drain B B and putting this drain into working order. I make no order as to the overflow

(1) 11 App. Cas. 127.

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from the pond at Ty Fry, since this has not been shown to have any bearing on the protection of the plaintiffs' buildings from any further slide of the tips. The plaintiffs will have their costs of the motion.

Solicitors: *Rider, Heaton, Meredith & Mills; Ingledew, Davies, Sanders & Brown, for Ingledew & Sons, Cardiff.*

H. C. G.

SARGANT J. 1921 *Dec.* 21.

DUNN *v.* BEVAN.

[1921. D. 1962.]

BRODIE *v.* BEVAN.

[1921. B. 4192.]

Contempt of Court—Judgment in Action—Trade Union—Circular Letter commenting on Judgment—Misrepresentation of Effect—Motion for Injunction.

In an action brought by certain members against the officers of a trade union, charging them with fraudulent misrepresentation and claiming declarations and injunctions, judgment was given for the defendants on the issue of misrepresentation, and for the plaintiffs on the rest of the case. The plaintiffs subsequently issued a circular letter to a large number of the members of the union, containing misleading comments on the judgment, including a suggestion that the defendants had not been cleared of fraud. The defendants having moved in the action for an injunction to restrain the issue of the circular:—

Held, that the action being at an end and judgment delivered there could be no possible interference with the course of justice in the issue of the circular, even if it misrepresented the judgment and proceedings, or was calculated to injure one of the parties, and the motion must be dismissed. Any such publication must be left to be dealt with by the ordinary law of libel.

MOTION.

The plaintiffs in the action of *Dunn and Others* v. *Bevan and Others* were members of the London branch of the National Society of Operative Printers and Assistants (hereinafter called "the Society") and the defendants, Bevan, Isaacs, Kelly and Hollis, were the President, the General Secretary, the Chairman of the Executive Council, and the Secretary of the

London branch of the society respectively. The plaintiff in the action of *Brodie* v. *Bevan*, which was consolidated with *Dunn* v. *Bevan* by order of November 4, 1921, was one of the plaintiffs in the latter action, and the defendants were the same in both actions. The society was a trade union certified as such under the Trade Union Act, 1913, and governed by rules contained in a handbook, and had about 20,000 members. The plaintiffs alleged that the defendants and the Executive Council of the Society in May, 1921, proposed that a levy should be imposed on the members of from 6*d*. to 4*s*. a week on their wages, and that the proposal should be submitted to a general or national ballot. The ballot was taken and resulted in the proposal being defeated by a small majority. The Executive Council refused to accept this result, and issued ballot papers for a fresh ballot upon a slightly different proposal for a general levy in July, 1921. The second ballot resulted in favour of the levy by a majority of 1483. The plaintiffs claimed a declaration that the ballot and the levy purported to be authorized thereby were invalid on the grounds (1.) that the ballot papers had not been checked or counted by the scrutineers appointed by the society, and (2.) that the ballot papers should have been rejected as being spoilt on the ground that each paper contained a direction by the Executive Council as follows: "If you want to save the Society, you must vote in favour of these proposals." They also alleged that the majority in favour of the levy was obtained by the misrepresentation and undue influence of the Executive Council, which had represented that the society was almost at the end of its resources. They also claimed a declaration that the defendants were not entitled to refuse the plaintiffs' weekly contributions to the society when tendered unaccompanied by the amount of the levy.

In August, 1921, the Executive Council of the society issued ballot papers for a general or national ballot to deal with proposed alterations in the rules of the society. The ballot was taken, but the plaintiffs alleged that it was invalidated by the fact that the ballot papers issued to the members of the London branch had the card numbers of the

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members marked thereon, so that they could be identified. The plaintiffs also claimed a declaration that this ballot was invalid, and an injunction to restrain the defendants from making any levy under the ballot of May, 1921, and from acting upon the purported ballot of August 8, 1921.

The hearing of the consolidated actions occupied three days, December 7, 8 and 9. The charges of misrepresentation made by the plaintiffs were mainly withdrawn during the hearing. Sargant J. held that the defendants were entitled to succeed on this issue. He said in the course of his judgment :—

"Having heard the evidence of the President of the Society and of the Secretary, I am of opinion not only that those statements were not false to their knowledge but that they were absolutely true. It seems to me to be proved quite conclusively that the Society was in a bad way financially, and that there were grave reasons why the financial position needed to be improved, and why it might have been impossible for the Executive Council to carry on the Society's work. At the time in question the amount that they had in hand for general purposes did not amount to more than 4*s.* or 5*s.* per member, 4000*l.* for 20,000 members roughly; and that of course in a case of necessity if it had been resorted to would only have been sufficient to furnish one or two days' strike pay to their members. There were other reasons at the time, which I need not go into, which rendered the period a critical one, and in my judgment not only were their statements absolutely true, but the Executive Council would have been wanting in their duty to their members if they had not pointed out the position in terms such as they used, or other equivalent terms. . . . . I do not think there was in these statements real exaggeration at all. I think that the members of the Executive Council were acting quite properly, and so far from being blameworthy in the matter, were praiseworthy. I think that really concludes the objections that were taken to the ballot, other than the objection that I have now to come to."

The learned judge then proceeded to hold that the two ballots the subject of the action were both invalidated, the

first, of May 30, by the fact that the scrutiny had not been made in the manner provided by the rules, or by the scrutineers appointed for that purpose, and the second, of August 8, by the fact that each of the ballot papers issued to the London members, who were about half the total membership, had been marked in pencil in the corner with the card number of the member to whom it was issued, thus practically destroying the secrecy of the ballot. He therefore made the declarations asked for by the plaintiffs, and gave them the general costs of the actions, but gave the defendants their costs of the issue of fraudulent misrepresentation as to the financial position of the society and the necessity for the levy, on which issue they had succeeded.

The defendant Isaacs, as General Secretary, immediately after judgment was given issued a circular addressed "To all Branch Secretaries and Fathers of Chapels" shortly stating the result of the action. It was headed "Re the legal action against the Society" and proceeded: "The case terminated to-day in the following fashion. All the charges of fraud, undue influence and publication of false statements which were contained in the charges actually brought against us have been withdrawn." Having stated the result of the decision as to the ballots the circular concluded thus: "The series of widespread charges against the Executive and its officers have therefore been reduced only to the two technical questions upon which we lost the action. The Society will have to pay the costs of the action, but the other side will have to pay all their expenses in the charges of fraud. Early next week a complete statement will be published giving more details."

The plaintiffs on December 12 issued a circular to all Branch Secretaries and "Fathers of Chapels" in the London district as a reply to the circular of the Executive Council. It was headed "United Chapel of the N. S. O. P. and A." and contained the following statements (inter alia) in various sizes of type:—

"The judge allowed Mr. Isaacs and Mr. Bevan to go into the witness box and say that in their minds they were

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justified at the time of sending out the May circulars in all the statements they made."

"We made no comment."

"Their Counsel offered no other evidence for the defendants whatever."

"We were called on for no evidence at all. We had thirteen witnesses in Court each day."

"The Judge on the third day said that the statements of the E. C. and officers were not blameworthy, but were praiseworthy in the circumstances, except that the statement on the ballot papers themselves were (*sic*) objectionable."

The circular then stated shortly the effect of the decisions as to the invalidity of the ballots, and the costs of the action, and concluded with the words, "Ah! Ah!! naughty, naughty." It was signed by the three plaintiffs, and the name of the printers was added at the bottom.

The defendants now moved for an injunction to restrain the plaintiffs from issuing or distributing the circular printed by them, or any other circular, leaflet or advertisement containing an unfair statement or report of the trial of the action or of the judgment of the learned judge.

Rolt K.C. and *Slesser* for the motion.

A. Grant K.C. and *Swords* for the plaintiffs took a preliminary objection. The proceedings are altogether misconceived. This is a motion after judgment in the action, and the Court will not intervene, either by way of injunction or attachment, to punish parties for issuing misleading comments on a judgment: Oswald on Contempt of Court, 2nd ed., p. 62; *Metzler* v. *Gounod.* (1)

[SARGANT J. referred to Seton on Judgments, 6th ed., p. 466.]

It is true the summary jurisdiction of the Court may be exercised where there has been scurrilous abuse of a judge, but that is not the case here: *Dallas* v. *Ledger* (2); *Kelly & Co.* v. *Pole.* (3) In that case the plaintiff moved for a writ of sequestration for contempt in commenting on proceedings in an

(1) (1874) 30 L. T. 264. (2) (1888) 4 Times L. R. 432.
(3) (1895) 11 Times. L. R. 405.

action, which was still pending, though an order had been made. The motion was dismissed with costs.

This is only an alternative for a motion for committal for contempt of Court, and there can be no contempt in any comment after the decision: *In re New Gold Coast Exploration Co.* (1)

Rolt K.C. and *Slesser* in reply. The Court will not allow a party to misrepresent what has been done or said in Court with the object, which is apparent here, of injuring other parties. The Court will restrain a libel, and will not permit the publication of proceedings to be made the vehicle of a libel: *Brook* v. *Evans.* (2) The effect of this publication is to suggest that the defendants and the Executive Committee have not been altogether justified, and to pervert the course of justice. It is clearly an attempt to make out that the charge of fraud, which was not fully withdrawn, was not disposed of.

[SARGANT J. Can you give any instance of such contempt being dealt with after judgment?]

There is no reported case of such contempt after judgment. The object of the circular was to prejudice a ballot now being held by the society for the election of officers.

Lord Hardwicke in *In re Read & Huggonson* (3) said: "Nothing is more incumbent in Courts of Justice than to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced before a cause is heard."

SARGANT J. This is a motion to restrain the plaintiffs and each of them their servants and agents from issuing or distributing or causing to be issued or distributed the leaflet or circular now being distributed by them, and being exhibit B to the affidavit of G. T. Bevan sworn on December 14, 1921, or any other circular or leaflet or advertisement containing an unfair statement or report of the proceedings at

(1) [1901] 1 Ch. 860.
(2) (1860) 29 L. J. (Ch.) 616.
(3) (1742) 2 Atk. 469. [No title in the report: sometimes cited as *Roach* v. *Garvan.*]

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the trial of this action or of the judgment in the action, to the prejudice of the defendants, or the Executive Council of the National Society of Operative Printers and Assistants or any of them or the members of the said society represented by them in this action.

The facts shortly stated are these. An action was brought by certain members of that trade union to restrain the Executive Council from proceeding on the result of certain ballots, on the ground that the ballots had not been properly taken; and in the proceedings in the action charges had been made against the officers of the society which amounted to charges of fraud. I heard the action out, and I determined that there were objections to the ballots which had been taken and I accordingly restrained the defendants from proceeding on the results of those ballots. At the same time I absolved the defendants from the charges of fraud which had been made against them, and which had only been half withdrawn, or partially withdrawn by counsel for the plaintiffs at the trial.

The result of my judgment was this, that for the purpose of doing that which the Executive Council desired to do, it would be necessary to have fresh ballots of the society, and those ballots, I was told, were accordingly in the course of being taken, or are still being taken. But I want to make it plain that they were not ballots in any way directed by the Court; they were ballots which were the result of the determination of the Court that the previous ballots had been ineffective, and the proceedings in the Court had come completely and absolutely to an end.

During the progress of the ballots or in anticipation of them the defendants, the Executive Council of the society, sent out a circular letter to the members of the society containing statements as to what had taken place during the trial, and the result of the trial, and those statements were made bona fide but were not in every respect accurate. It is there stated that the charges brought against the Executive Council by the plaintiffs had been withdrawn. It is not the case that they had been withdrawn. I found in favour of the Executive on those charges, but they were not in fact

withdrawn, except to a limited extent. There is another statement that I "decided that the ballot"—that is, the second ballot —"is also null and void because some of the London papers had the members' numbers marked on them," which would seem to imply that it was only a comparatively small proportion of the London papers that had the members' numbers marked on them. I thought on the evidence before me that the numbers were on the whole of the London members' papers, and I went on that assumption. It seems now that some small proportion of the London members' papers had not the numbers marked on them. I think those inaccuracies are comparatively trifling, but still they are inaccuracies. As a counterblast I suppose to that circular, the plaintiffs issued a circular to the members; and in that circular they made misrepresentations which I think were of a rather more serious nature than those that were made in the original circular issued by the Executive Council. It seems to me that when they, the plaintiffs, say that I "allowed Mr. Isaacs and Mr. Bevan to go into the witness box and say that in their minds they were justified at the time of sending out the May circulars in all the statements they made" and that the plaintiffs "made no comment," that they were really not at all fairly stating the course or the result of the proceedings. They then say they "were called on for no evidence at all," though they "had thirteen witnesses in court each day," which would seem to imply that it was for the defendants to make out their case, and that the plaintiffs had not to make out any case at all in view of the inadequacy of the defendants' case. Of course it was for the plaintiffs to make out their case, they chose what witnesses they would put in the box; and that statement again is calculated to prejudice the persons to whom the statement is sent. Later on there is a very fair statement of what I said in praise of the Executive Council. But then they talk about the plaintiffs being given their general costs of the action and wind up with these remarkable words: "Ah! Ah!! naughty, naughty"—a semi-comic termination of the circular.

Now I am asked on that to treat the issue of the first circular

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by the plaintiffs as being a contempt of Court. Although I am not asked to send the plaintiffs to prison, I am asked to punish them by granting an injunction against them and by making them pay the costs. In my judgment, I ought to do nothing of the kind. It seems to me that the law is pretty well settled in these cases now. I do not deal, of course, with the case of a report which amounts to scandalising the Court by making attacks upon the judge who presided at the trial—that is entirely out of the question here, and there is nothing in this circular to be complained of by the judge who tried the case. The only other sort of contempt which I think could effectively be established against the plaintiffs is that they were doing something which was interfering in some sort of way with the administration of justice. But as to this the principle is put thus in a well-known work—Oswald on Contempt of Court, 2nd ed., p. 62 : " Proceedings are pending immediately the writ is issued, and as long as any proceedings can be taken. But when the cause is dead or ended, comments may be made ; and the fact that a new trial has been moved for makes no difference." And there are two cases referred to—*Metzler* v. *Gounod* (1) and *Dallas* v. *Ledger* (2)—which completely bear out that proposition.

Now here, it seems to me clear that when I had given my judgment in the action, the proceedings were dead and ended; and I think that from that time forward the Court ought not to trouble itself with the matter unless it is absolutely compelled to do so by reason of some contempt such as might fall within the first class of cases to which I have referred.

The question has come before the Court on several occasions, but I will refer merely to what was said by Chitty J. in the case of *Kelly & Co.* v. *Pole.* (3) That was a motion by the defendants for a writ of sequestration against the plaintiffs' property for contempt of Court in sending certain circulars to the defendant's customers commenting on proceedings in the action whilst the action was pending. It appeared that an order had been made by North J. (sitting for

(1) 30 L. T. 264. (2) 4 Times L. R. 432.
(3) 11 Times L. R. 405.

Chitty J.) by consent of the parties, putting an end to the action, and an undertaking was also given by the plaintiffs not to send out any circular in relation to the subject of the action. It was now contended by the defendants that if a contempt of Court had been committed, and there had been an attempt to prejudice the proper trial of the action, the Court would be justified in interfering, although the action was at an end, the jurisdiction of the Court being not merely preventive but punitive. Thereupon Chitty J., after observing that he had not heard the merits of the application and that the gist of the alleged contempt was interference with the course of justice so as to interfere with a fair trial, said that he must dismiss the motion with costs, as there was no longer anything to be tried, for the action was at an end. To allow such a motion would be unduly to strain the doctrine of contempt. If any wrong had been done, the applicants had their remedy by action for libel.

It seems to me that applications for alleged contempt ought to be very carefully scrutinised, and that the Court ought not in any way to enlarge the jurisdiction or apply it to matters which are outside the well established lines. It is suggested by Mr. Rolt that there is a third form of contempt, not consisting either in scandalising the Court or in interfering with the course of justice; and that that form of contempt consists in a misrepresentation of the judgment of the Court and of the proceedings in Court for the purpose of injuring one of the parties. In my judgment there is not such a third class of contempt as Mr. Rolt asks me to give effect to. It seems to me that if the proceedings in a Court are ended, then, unless there is an attack on the Court itself, the mere making of statements as to the proceedings must be dealt with by way of the ordinary law of libel or slander if they are misrepresentations and go beyond what is legally permissible. It is significant that in the only two cases which Mr. Rolt relied on for the purpose of establishing his proposition, the proceedings for contempt failed. The first was *In re Read & Huggonson* (1), a case before

(1) 2 Atk. 469.

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Lord Hardwicke L.C., and the marginal note, which I think is all I need refer to, is this: "It is incumbent on Courts of justice to preserve their proceedings from being misrepresented; and the minds of the public should not be prejudiced before a cause is heard." So that the very case to which Mr. Rolt has referred is a case which really shows that the doctrine that is being exercised is a doctrine which falls within the second head of contempt as interfering with the course of justice, and the marginal note reads on in this way: "If a libel be public or private, the only method is to proceed at law, and this Court has no cognizance, unless it is a contempt by being an abuse of their proceedings." That was in fact a case where proceedings were pending.

The other case referred to is a case of *Brook* v. *Evans* (1), where the headnote is this: "The Court will punish as for a contempt those who make the publication of its proceedings the vehicle of a libel; but, although it has the power of restraining the publication of its proceedings pending litigation, it will not restrain the publication of every unfair report purporting to represent what takes place in open Court." In that case, what were misrepresented were proceedings on motion, so that the action itself was going on at the time this application was made; and the remarks of Knight Bruce and Turner L.JJ. are very significant and are full of good common sense. Knight Bruce L.J. says merely this: "The publication may be wise or unwise, full or not full, accurate or inaccurate, but I do not think it is a case for an injunction." And Turner L.J. says this: "There is no doubt that the Court has power to grant an injunction in cases of this description"—that is, cases in which proceedings in the Court were pending. "Every Court has the power of preventing the publication of its proceedings pending litigation; but it is not to be exercised in all cases, and it is a question quite in the discretion of the Court. If we were to entertain this application we might have to sit here from day to day to try the fairness or unfairness of every report appearing in the newspapers. I cannot say

(1) 29 L. J. (Ch.) 616.

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I approve of the publication. It is a discreditable mode of carrying on business." That was the publication in that case.

Now here I feel very strongly that if the Court were to be burdened with examining statements of this kind between rival parties as to what exactly took place in proceedings in an action which has come to an end and has been terminated by a formal judgment, the Court might for many a long day be occupied with such applications, and have its burdens very considerably increased without any good result. In my judgment this is really a "storm in a tea-cup," and the motion ought to be dismissed with costs.

Solicitors for defendants: *Shaen, Roscoe, Massey & Co.*
Solicitor for plaintiffs: *H. W. Parker.*

H. L. L.

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In re CHAPMAN.

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[1921. C. 2438.]

Will—Construction—Residuary Gift—Charitable Purposes—Absence of Trust—Sole Executor—Discretion of Executor as to Objects and Purposes—"At his own disposal"—Executor Trustee for Next of Kin.

By her will a testatrix appointed an executor, and after giving various pecuniary legacies, including two for charitable purposes, and 100*l.* to her executor, she left in blank the name of her residuary legatee. By a codicil the testatrix desired that her residue should be "applied for charitable purposes, as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal." No written directions were given as to the charities to be benefited:—

Held, (1.) That there was no good charitable trust declared, inasmuch as, in the event which had happened, there was a discretion in the executor to devote the residue to objects and purposes other than charitable.

(2.) That the trust for these objects was too indefinite for the Court to execute; and there being no direct gift of the residue to the executor, the added words "and to be at his own disposal" were not sufficient to

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enable the Court to hold that the executor took the residue beneficially. He therefore held it as trustee for the next of kin.

Vezey v. *Jamson* (1822) 1 S. & S. 69 followed.

In re Howell [1915] 1 Ch. 241 distinguished.

By her will, dated October 2, 1911, Matilda Augusta Chapman, spinster, appointed her solicitor, the plaintiff William Henry Hales, one of the executors of her will (the name and address of the other executor being left in blank) and directed her said executors to pay her debts and funeral expenses, and then, after bequeathing various pecuniary legacies to relations and friends, she gave a legacy of 200*l.* to the vicar for the time being of Trinity Church, Little Queen Street, Holborn, for the benefit of the poor of the parish, one of 100*l.* to the Church Army, and to each of the executors who should prove her will and act in the administration of the estate a sum of 100*l.*; and as to the rest, residue and remainder of her estate and effects she gave and bequeathed the same to ——————. The will contained also a declaration that her executor thereunder being a solicitor should be entitled to charge and be paid all professional or other charges for business done by him or his firm in connection with the trust.

By a codicil made on January 17, 1920, the testatrix purported to dispose of her residuary estate as follows: "Subject to the payment of the legacies given by my will and all duties, the residue of my property I desire applied for charitable purposes as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal."

The testatrix died on November 11, 1920, and the will and codicil were proved by W. H. Hales as sole executor on December 4, 1920. No written directions by the testatrix as to the charitable purposes referred to in her codicil could be found. The statutory next of kin of the testatrix were two cousins, the defendants Margaret MacGee, widow, and Maria Delany, the surviving children of the testatrix's deceased aunt, Elizabeth Maria Delany.

On May 30, 1921, W. H. Hales took out an originating summons for the determination of the questions :—

(1.) Whether, upon the true construction of the will and codicil, the residue of the testatrix's property was, in the events which had happened, applicable for such exclusively charitable purposes as the executor might in his discretion select ?

(2.) If that question was answered in the negative, whether the residue of the testatrix's property—

(*a*) was to be held by the executor in trust for her statutory next of kin, or

(*b*) belonged to the executor beneficially ?

A. B. Nutter for the summons. If there is no good charitable trust declared here the question arises between the next of kin and the executor as to the ownership of the residue. The executor is unwilling to press his claim as against a charitable trust, but if there is none he claims to be beneficially entitled to the residue on the terms of the codicil. It is " to be at his own disposal." *In re Howell* (1) was a very similar case, where these very words were used, and where the executor had also a prior legacy given to him. The Master of the Rolls there held that there was a gift to the individual executor beneficially, and Swinfen Eady L.J. said that the words " at his own disposal " afforded a key to the construction of the gift.

Dighton Pollock for the Attorney-General. There is a good general charitable trust declared by this testatrix, and it applies to the whole of this gift. That is the reasonable meaning of it. The testatrix had a manifest charitable intention : *Pocock* v. *Attorney-General.* (2) The discretion of the executor is to be substituted for that of the testatrix herself in the selection of charitable purposes. The word " retain " indicates that the executor is to retain and deal with the residue himself, and it is only an alternative way of giving the property which in either case is for charitable purposes.

(1) [1915] 1 Ch. 241. (2) (1876) 3 Ch. D. 342, 347.

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J. G. Wood for the next of kin. This gift fails as a charitable gift by reason of the absence of written instructions. I accept the decision in *Pocock* v. *Attorney-General* (1), but here the executor can retain the residue for objects and purposes other than charitable, and that causes the gift to fail as being too undefined for the Court to execute. It is like *Vezey* v. *Jamson* (2), where the gift of residue was to executors upon trust to dispose of it at their pleasure for charitable or public purposes, and it was held to be too general and undefined, and the next of kin were entitled. That case, therefore, is precisely in point, and was very similar also to *Morice* v. *Bishop of Durham* (3) referred to in that case. The codicil here must be read with the will, which directs the plaintiff to pay the legacies qua executor, and the residue is to be applied for charitable purposes as she might direct in writing, or to be retained as stated in the codicil for other objects. That must mean to be retained for such objects as he may select, and then he is to dispose of it accordingly. With regard to the claim of the executor to take beneficially, he was appointed to administer the estate and carry out the will, and takes the residue as a trustee. The case appears to be stronger where there is a legacy given to a sole trustee, as here, and there is no direct gift of the residue. It is inconsistent that he should take the residue beneficially, but must be held to hold it as trustee for the next of kin: Theobald on Wills, 7th ed., p. 798, where *Nourse* v. *Finch* (4) and other cases are referred to in support of that proposition. In *In re Howell* (5) there was a separate gift to the executor of the particular property, a fresh departure altogether. Here there is no gift of this residue in terms to the executor. The residue therefore being undisposed of, the executor holds it as trustee for the next of kin of the testatrix.

EVE J. Two questions are raised by this summons on the meaning to be attached to the residuary gift contained

(1) 3 Ch. D. 342.
(2) 1 S. & S. 69.
(3) (1804) 9 Ves. 399; 10 Ves. 522.
(4) (1791) 1 Ves. Jun. 343.
(5) [1915] 1 Ch. 241.

in the codicil to the will of the testatrix. [His Lordship referred to the material parts of the will and read the terms of the codicil.] The testatrix died without giving any directions in writing as to the charitable purposes to which she wished her residuary estate to be applied, and the first question is whether she has manifested a charitable intention sufficiently clearly to enable the Court to say that the residuary estate is impressed with a charitable trust notwithstanding that the particular charitable purposes are not indicated. Assuming this question to be answered in the negative, the next question is, Does the executor take the residue beneficially, or is he a trustee thereof for the next of kin?

As to the first question in my opinion there is no good charitable trust declared. In the event which has happened, there is a discretion vested in the executor under which he might devote the residue to objects and purposes other than those of a charitable character, and in that state of things it is impossible to say that there is a good charitable trust. Upon the second question it is to be observed that there is no direct gift of the residue to the executor; he holds it virtute officii and he is either to apply it for such charitable purposes as the testatrix may direct or to retain it for such objects and purposes as he may select. Prima facie he holds the property in trust for these objects, and if the codicil had stopped there, I think it would have been entirely covered by the authority cited by Mr. Wood—namely, *Vezey* v. *Jamson* (1) where it was held that executors to whom the residue was given to be disposed of at their pleasure for charitable or public purposes held as trustees for the next of kin so soon as it was determined that the trust expressed was too general and indefinite to be executed. But the codicil here goes on to say "and to be at his own disposal," and the question arises whether the addition of those words operates to give him a beneficial interest in the residue. The case of *In re Howell* (2) cited by Mr. Nutter on behalf of the executor was one of some difficulty. In that case there was a direct

(1) 1 S. & S. 69.
(2) [1915] 1 Ch. 241.

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gift of the residue to the executor, which the Court held on the language used to be a gift to him as an individual. It is true that this construction was arrived at largely if not mainly by reason of the use of the words "at his own disposal." I have the same words here and I have to determine whether they are sufficient in this testamentary disposition to show that the testatrix intended to give him the residue as an individual. I do not think they are—there is no gift to him—he holds the residue as a representative, because he takes it by virtue of his office, and there is a legacy given to him as executor. Taking all these circumstances together I am not prepared to hold that the executor takes the residue beneficially. He holds it as trustee for the next of kin.

Solicitors: *W. H. Hales; The Solicitor to the Treasury; Sayer, Ledgard & Smith.*

G. M.

RUSSELL J.
1922
Jan. 17, 24.

In re COOKE.

WINCKLEY *v.* WINTERTON.

[1921. C. 4535.]

Will—Testamentary Power of Appointment—Covenant to appoint in a particular Way—Covenant not to revoke Appointment—Will exercising ower in accordance with Covenant—Subsequent will revoking Appointment—Effect.

The donee of a special testamentary power of appointment covenanted by deed to appoint to her son out of a trust fund not less than 4000*l.*, and not to revoke that appointment. There was no covenant to leave unappointed such part of the trust fund as would, together with any sum actually appointed, make up the covenanted sum. The donee of the power executed a will by which she appointed to her son not less than 4000*l.* but afterwards executed another will, revoking the first, by which she appointed a sum of less than 4000*l.*:—

Held, that the covenant to appoint not less than 4000*l.* was not a fetter on the power of appointment which prevented the donee of the power afterwards exercising it so as to defeat the covenant; that the covenant to appoint in a particular way was void, and that the covenant

not to revoke the appointment, though negative in form, was in substance and in fact a covenant to exercise a testamentary power in a particular way and was also void.

In re Evered [1910] 2 Ch. 147 distinguished.

ORIGINATING SUMMONS.

Under the will of James Cooke, who died in 1868, the clear residue of the proceeds of sale of his real and personal estate, and the income thereof, was directed after the death of his wife, which occurred in 1898, to be dealt with as follows: "And from and immediately after the decease of my said wife I direct that the whole of such annual income shall be divided into two equal parts one part whereof shall be paid to each of my said daughters (that is to say) to my daughter Eliza the wife of the said Thomas Johnson Hill and to my daughter Charlotte Maria Taylor for and during the term of their respective lives for their separate use as hereinbefore mentioned and from and immediately after the decease of either of them I direct that the principal of such moneys the interest whereof I have so bequeathed to them respectively for life as aforesaid shall be divided amongst their children respectively and the issue if any of such of them as may be dead in such shares as their mother shall by her last will direct and in default of any such will or so far as the same if made shall not extend amongst them equally save that the children of any deceased parent are to take such parent's share only And in case either of my said daughters should depart this life without leaving issue her surviving then I bequeath the share to which such issue would by this my will have been entitled unto my then next of kin to be distributed according to the Statute of Distributions of the Estates of Intestates." The power of appointment was testamentary only, and there was no hotchpot clause. Mrs. Hill died in 1917. She had four children, of whom one died in 1871, aged seven years. Another died in 1894 without issue. The other two survived her and were still alive—namely, the defendant, Gertrude Mary Barry, and a son, Kenelm Johnson Hill. In 1905 Kenelm was about to marry and, on September 5, three documents were executed. One was the

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following deed of covenant entered into between mother and son: "Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the said intended marriage the said Eliza Hill hereby covenants with the said Kenelm Johnson Hill that in case the said intended marriage shall be solemnised she the said Eliza Hill will forthwith in exercise of her power for this purpose given her by the said will of the said James Cooke by will duly executed appoint to the said Kenelm Johnson Hill absolutely a sum of not less than 4000*l.* clear of all deductions whatsoever to be raised and paid to him or as he may direct out of the said one equal half part of the said lands hereditaments and trust funds or the proceeds of the sale and conversion thereof so held in trust for the said Eliza Hill and her children and issue as aforesaid And the said Eliza Hill hereby covenants with the said Kenelm Johnson Hill that in case the said intended marriage shall be solemnised the said Eliza Hill will not at any time or times execute any will or codicil or other testamentary disposition or do or cause to be done any act or thing whereby the said will hereinbefore covenanted to be executed shall be revoked or altered in such a way as in any way or to any extent to revoke or alter or affect the said appointment to the said Kenelm Johnson Hill of the said clear sum of not less than 4000*l.*" The second document was a will executed by Eliza Hill by which, in exercise of the power given to her by the will of her father, James Cooke, she appointed to her son Kenelm a sum of more than 4000*l.* The third document was a marriage settlement by which Kenelm assigned to trustees, first the said clear sum of not less than 4000*l.* covenanted to be appointed and also the benefits of the covenants contained in the indenture of even date; and, secondly, all the share in James Cooke's estate to which he was or might thereafter become entitled under the trust in default of appointment contained in James Cooke's will.

In 1915 Eliza Hill executed a fresh will by which all former wills were revoked. The new will was dated February 9, 1915, and was proved on June 7, 1921, and was in the following terms: "Whereas by the will of my late husband James

Cooke "—by an error the testatrix referred to her father in her will as her late husband—" I have a power of appointment of one half of the capital moneys forming the residue of my said husband's estate Now in exercise of the said power of appointment and of all other powers enabling me I do hereby appoint that after my decease my one half share of and in the estate of the said James Cooke and the capital and residue wherein I have a power of appointment shall be equally divided between my daughter Gertrude Mary Barry and my son Kenelm Johnson Hill in equal shares as tenants in common absolutely I give devise and bequeath all other my real and personal estate unto my executors and trustees in trust for my said son and daughter in equal shares as tenants in common absolutely."

The fund over which Eliza Hill had this power of appointment amounted to 6000*l.*

In these circumstances this summons was taken out by the surviving trustee of the will of James Cooke to determine who, on the death of Eliza Hill, became entitled to the trust fund.

J. Bradley Dyne for the plaintiff.

C. J. Mathew K.C. and *J. N. Gray* for the trustee of the marriage settlement of Kenelm J. Hill. Although the donee of a power of appointment exercisable only by will cannot by deed appoint the fund she can negatively tie her hands as to the manner in which she shall afterwards exercise her testamentary power. She may covenant that a beneficiary shall not have less than a certain sum. In such a case the donee of the power may exercise it by appointing by will to the beneficiary not less than the named sum, or by so appointing to other beneficiaries that there remains such a sum unappointed as will give to the particular beneficiary not less than the named sum. Any act purporting to be an exercise of the power which will defeat the covenant will be an invalid exercise of the power to the extent to which the covenant will be defeated: *In re Evered.* (1) The donee of

(1) [1910 2 Ch. 147, 161.

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the power covenanted to appoint to Kenelm J. Hill not less than 4000*l.* out of the trust fund of 6000*l.*, but she has made an appointment of 3000*l.* to him and 3000*l.* to Gertrude M. Barry. That is an invalid exercise of the power to the extent to which the covenant will be defeated. After the execution of the covenant she could only so deal with the fund that Kenelm should receive 4000*l.* either by appointing to him that sum, or by appointing to others such sums as that the balance not given to him absolutely by appointment should come to him in default of appointment: *In re Evered.* (1) The appointment to Kenelm of 3000*l.* is good as far as it goes but, as under his mother's last will he only receives half of the sum unappointed, the appointment to Gertrude M. Barry is good only to the extent of 1000*l.*, and the remaining 2000*l.* remains unappointed, of which Kenelm takes 1000*l.*, thus making up the covenanted sum of 4000*l.*

Clauson K.C. and *Archer* for Gertrude M. Barry. It is lawful for the donee of a special testamentary power to release it wholly or in part, but it is unlawful to covenant to exercise the power in a particular way and such a covenant is void: *Palmer* v. *Locke* (2); *Thacker* v. *Key* (3); *In re Evered* (4); *In re Bradshaw.* (5) When the donee of a special testamentary power has in fact exercised it in a particular way a covenant not to revoke that appointment is illegal and void. The covenants here being void the fund passes under the appointment in fact made and my client and Mr. Mathew's each take half. *In re Evered* (6) does not apply, because the deeds there were construed as pro tanto releasing the power of appointment. If the Court should hold that this deed can be construed as releasing the power, it is submitted that it can only operate to fetter the donee of the power from appointing more than 2000*l.* to the daughter.

On that construction Kenelm would take 3000*l.* under the appointment and his sister 2000*l.*, leaving 1000*l.* unappointed of which each would take half. In *In re Evered* (6) the deeds

(1) [1910] 2 Ch. 147, 161.
(2) (1880) 15 Ch. D. 294.
(3) (1869) L. R. 8 Eq. 408.
(4) [1910] 2 Ch. 147, 156.
(5) [1902] 1 Ch. 436.
(6) [1910] 2 Ch. 147.

were held to bind the donee of the power to leave unappointed enough to make up, with the valid appointments, the covenanted sum, but there is nothing of the kind here. In this case both the covenants are void, because they aim at controlling the manner in which the appointment is to be made and not at releasing the power of appointment. In *In re Evered* (1) the appointor disabled herself by deed from so appointing the fund as not to secure that each of three sons should receive 7000*l.* That was releasing her power, but this deed releases nothing. The Court of Appeal held that in order to leave each of the three sons the 7000*l.* the will must be construed as leaving unappointed 49,000*l.*, as there were seven children, each being entitled under the ultimate trust of the settlement to one-seventh of the settled fund in default of appointment. If this deed be assumed to be valid by no construction can you give it the operation of the deed in *In re Evered.* (1) It is impossible to get out of the words a covenant to leave something unappointed. The purpose of this deed is to secure that something should flow to Kenelm from his mother, whereas in *In re Evered* (1) the purpose was that something should flow to the sons from the original testator.

D. D. Robertson for two beneficiaries under the will of a son of Eliza Hill who predeceased her, claimed a share of any fund that went in default of appointment.

Cur. adv. vult.

Jan. 24. RUSSELL J. read the following written judgment: The first point to determine is who are the objects of Mrs. Hill's testamentary power of appointment, and who are the beneficiaries under the gift contained in the will in default of appointment; that is to say, whether in order to come within either class, a child of Mrs. Hill must survive her. Looking at the form of both gifts, and at the form of the ultimate gift in favour of the testator's next of kin, I feel no doubt that the will must be construed as directing a division among the children of Mrs. Hill who survive her and

(1) [1910] 2 Ch. 147.

RUSSELL J. 1922 COOKE, *In re.* WINCKLEY *v.* WINTERTON.

the issue, if any, who survive Mrs. Hill, of such of Mrs. Hill's children as have died before her in such shares as Mrs. Hill by her last will directs, and in default of any such will, or so far as the same shall not extend, among the children of Mrs. Hill who survive her and the issue, if any, who survive Mrs. Hill, of such of Mrs. Hill's children as have died before her. Upon this footing, and in the events which have happened, the only persons interested in the share of Mrs. Hill are the defendant, Gertrude Mary Barry, and Kenelm Johnson Hill or those claiming under him.

The next question to decide is how this share is to be divided among the persons entitled thereto. The share amounts in value to over 6000*l.*, but for the purposes of argument before me it was treated as being worth exactly 6000*l.*, and I will continue so to treat it for the purposes of this judgment. In 1905 the son Kenelm contemplated matrimony. The parties were anxious that funds (to be settled on the marriage) should be provided out of the residuary estate of James Cooke. Kenelm had an interest in his mother's share in default of appointment if he survived her; but this might prove to be nothing, for his mother might appoint the share in favour of his sister, or he might die before his mother. The mother could make no immediate appointment in favour of her son because the power was testamentary only. She might have formally released her power in toto, but this also might have proved nugatory if Kenelm had died before his mother. True it is that children of Kenelm who survived his mother would take under the will of James Cooke; but no provision could be made for Kenelm's intended wife.

The procedure resorted to was as follows: three documents were executed on September 5, 1905. One was a deed of covenant entered into between the mother and son of which the operative part was as follows: [His Lordship referred to the deed and continued:] The second was a will executed by Eliza Hill by which she appointed to her son Kenelm a sum of more than 4000*l.*, and the third was Kenelm's marriage settlement. Had the will of September 5, 1905, remained unrevoked no trouble would have arisen. The

appointment therein contained would not have been rendered invalid merely by the fact that the appointor had covenanted to make it: *Palmer* v. *Locke* (1); but in 1915 Eliza Hill executed a fresh will, by which all former wills were revoked, and exercised her power of appointment in a different manner. [His Lordship referred to the will and continued:] That appointment which gives the property to the two surviving children in equal shares is the only operative appointment made by Mrs. Hill, and must stand good unless she has by her deed of covenant effectively disabled herself from making it.

Mr. Mathew's contention on behalf of the trustees of the son's marriage settlement was that the covenant bound the mother to appoint to the son not less than 4000*l.*, that her last will only gave him 3000*l.* by the appointment, and that accordingly she was debarred from appointing the balance except in such a way as to give the son another 1000*l.* under the trust in default of appointment. In order to effectuate this, 2000*l.* must be treated as passing in default of appointment, in which event only 1000*l.*, and not 3000*l.* is validly appointed to the daughter. The net result of this contention, if correct, would be that the son would take 3000*l.* as appointee and 1000*l.* in default of appointment, while the daughter would take 1000*l.* as appointee and 1000*l.* in default of appointment. In support of this contention, Mr. Mathew relied on *In re Evered*. (2)

Mr. Clauson, on behalf of the daughter, contended first that the deed of covenant had no legal operation at all, that it was void, and that the fund passed in equal shares under the appointment actually made; and secondly, that if the deed of covenant had any operation at all, it could only operate so as to disable the appointor from appointing more than 2000*l.* in favour of the daughter. There is nothing in the deed of appointment, as there was in *In re Evered* (2), binding the appointor to leave unappointed sufficient to make up, with the appointed sums, the covenanted sums. Upon this view the son would take 3000*l.* as appointee, and 500*l.* in

(1) 15 Ch. D. 294, 303. (2) [1910] 2 Ch. 147.

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default of appointment; the daughter would take 2000*l.* as appointee and 500*l.* in default of appointment.

Of these rival views I adopt the contention that the deed of covenant had no legal operation at all.

In my opinion, the donee of a special testamentary power of appointment cannot validly covenant to appoint by will in a particular way. This proposition is stated by Cozens-Hardy M.R. in *In re Evered* (1) to be either elementary and beyond dispute, or to be settled by binding authority. The reason is not far to seek. Such a power is in the nature of a fiduciary power to be exercised by the appointor's will only; so that up to the last moment of his life he may deal with the funds having regard to the circumstances then affecting the various objects of the power. It is not a proper discharge of the donee's duty to fetter his fiduciary discretion by a covenant executed beforehand: see per James V.-C. in *Thacker* v. *Key* (2), and per Brett L.J. in *Palmer* v. *Locke* (3), and *In re Bradshaw*. (4) Such a power may, no doubt, be effectively and validly released; or the donee may validly covenant not to exercise the power. But in such a case the objects of the power, if they acquire any benefit in the property which is subject to the power, do so under trusts in default of appointment. They derive their benefit from the donor of the power, not as a result of any pretended discretion of the donee exercised under the fetter of an antecedent bargain entered into by him, and in reality depriving him of any discretion at all. The deed of covenant in this case contains two covenants, the one an affirmative covenant to execute a will exercising the testamentary power in a particular way; the other a negative covenant not to revoke or alter the will in that respect. The latter covenant is purely ancillary to the former; its sole purpose is to render the former effective. Though negative in form, it is in substance and in fact a covenant to exercise a testamentary power in a particular way. It is a covenant to maintain effective a document which apart from the covenant would be

(1) [1910] 2 Ch. 147.
(2) L. R. 8 Eq. 408.
(3) 15 Ch. D. 294.
(4) [1902] 1 Ch. 436.

ambulatory and revocable. Neither covenant, in my opinion, has any legal operation.

Let me say a few words about the case of *In re Evered.* (1) As I read the judgments in that case their foundation is this: that the documents executed by the appointor operated so as to bind the appointor to abstain from appointing in such a way that the covenantees would not get the stipulated sums. In other words, the documents operated effectively upon the footing of the obligation on the appointor being an obligation to refrain from exercising her power, not an obligation to exercise her power in a particular way. The benefits which were thus secured to the three sons flowed from the trusts in default of appointment declared by the donor of the power, not from an exercise of the power of appointment bargained for between the donee of the power and some of the objects of the power. That decision appears to me to have no application to the facts of the present case.

I declare that the fund here in question belongs as to one moiety to the defendant, Gertrude Mary Barry. The other moiety, being in value below 4000*l.*, belongs to the defendant, William Henry Winterton, as the surviving trustee of Kenelm's marriage settlement. The costs of all parties as between solicitor and client will be paid out of the fund before division.

Solicitors: *Field, Roscoe & Co., for Freer & Co., Leicester; Kinch & Richardson, for Lloyd & Pratt, Newport, Mon.*

(1) [1910] 2 Ch. 147.

J. B. B. M.

RUSSELL J.

1922

Jan. 26; *Feb.* 8.

In re RUSH.

WARRE *v.* RUSH.

[1921. R. 1954.]

Will—Marriage Settlement—Reversionary Interests liable to be divested—Restraint on Anticipation—Interest in Default of Appointment—Exercise of Power of Appointment—New Estate—Statutory Charge—Treaty of Peace Order, 1919.

A reversionary interest in trust funds in England which is vested, but liable to be divested by the exercise of a power of appointment, is a "right, property or interest," within s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919. Where such vested reversionary interests in English trust funds are assigned to trustees upon trust to pay the income to a married women for life, with a restraint on anticipation, the statutory charge created by the Order attaches to them notwithstanding the restraint on anticipation. Where the beneficial interests of German nationals in English trust funds in default of appointment are charged, the exercise of a power of appointment in their favour, after the date when the Treaty came into force, divests the estate limited in default of appointment and creates a new estate which is not charged by the Order.

ORIGINATING SUMMONS.

Spencer Rush, a British national, was the son of William and Anna Spencer Rush and the father of the two defendants, Mrs. Metzler and Mrs. Wolf, who both married German nationals. Mrs. Wolf had two children born respectively in 1902 and 1903.

By a settlement dated April 20, 1876, and made in contemplation of the marriage of Spencer Rush, certain funds were settled by or on behalf of the husband. The beneficial trusts declared were as follows: One half of the income for Spencer Rush for life, and the other half on a discretionary trust for Spencer Rush, his wife and children during his life; after Spencer Rush's death 300*l.* a year out of income to his widow during her widowhood, and subject thereto both capital and income for the issue of Spencer Rush as he should by deed or will appoint; in default of appointment for the children of Spencer Rush who being male should attain twenty-one or being female should attain that age or marry equally.

William Rush the father of Spencer Rush died in 1880. By his will he gave his residuary estate upon the following trusts: His wife Anna Spencer Rush for life; Spencer Rush for life; subject thereto, as to capital and income for Spencer Rush's children as Spencer Rush should by deed or will appoint; in default of appointment for all Spencer Rush's children who being male should attain the age of twenty-one years or being female should attain that age or marry equally. Anna Spencer Rush (the mother of Spencer Rush) died in 1881. By her will dated February 2, 1881, she directed her trustees to invest 500*l.* upon trust securities and pay the income to her daughter-in-law Louise Rush during her life and on her death to divide the capital thereof equally between such of the children of her said daughter-in-law as should be then living. She then gave her residuary estate upon trust to pay the income to Spencer Rush for life and subject thereto as to capital and income for his issue as he should by deed or will appoint, and in default of appointment for all Spencer Rush's children who being male should attain the age of twenty-one years, or being female attain that age or marry, equally. On the marriage of Mr. and Mrs. Wolf a settlement was executed, dated August 12, 1901, by which she assigned all her interest under her parents' marriage settlement, and under the wills of her grandfather and grandmother, to trustees. The beneficial trusts declared by that settlement were as follows: Mrs. Wolf for life for her separate use without power of anticipation; after her death as to both capital and income for the issue of her marriage as she should by deed or will appoint; in default of appointment for all the children of the marriage who being male should attain the age of twenty-one years or being female should attain that age or marry equally. Power was given to Mrs. Wolf to appoint, but only by will, a life or less interest in all or any part of the trust funds to her said husband. If no child should attain a vested interest the trust funds were to be held for such persons as she should appoint generally, by deed while discovert, or by will whether covert or discovert, and in default of appointment for her statutory next of kin as if

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she had died intestate domiciled in England and without ever having been married. Power was given to her to make a partial resettlement on any future marriage in favour of any subsequent husband and issue by any subsequent marriage.

The Treaty of Peace signed at Versailles on June 28, 1919, came into force on January 10, 1920. By s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919 (which has effect as a statutory enactment) it is provided that all property, rights and interests within His Majesty's dominions or protectorates belonging to German nationals at the date when the Treaty came into force (with an immaterial exception) and the net proceeds of their sale liquidation or other dealings therewith are thereby charged with the payments therein mentioned. The trust funds comprised in the four documents are in this country.

Spencer Rush survived January 10, 1920, but died on October 14, 1920. He never exercised any of the powers of appointment amongst his children or issue given him by his marriage settlement, or by the wills of his father and mother. On June 13, 1921, Mrs. Wolf exercised her power of appointment by deed poll and appointed that the stocks, funds, securities and monies subject to her marriage settlement should after her death be assigned to her two children absolutely in equal shares on attaining the age of twenty-one or marrying.

This summons was issued by the trustees of the two wills and the two settlements with a view to having it determined whether the beneficial interests of any and which of the beneficiaries under those four documents were subject to the charge created by s. 1, sub-s. xvi., of the Treaty of Peace Order, 1919.

Ashworth James for the plaintiffs.

Romer K.C. and *Wallington* for Mrs. Metzler and Mrs. Wolf. On January 10, 1920, the interests of Mrs. Metzler were reversionary; as to the trust fund of 500*l.* they were contingent, and as to her other interests they were liable to be

defeated by the exercise by her father of his power of appointment. Her interests therefore were not "property, rights and interests belonging to" a German national when the Treaty came into force. The interests of Mrs. Wolf before her marriage were the same as those of her sister but on her marriage she settled those interests. It is clear that the Treaty of Peace Order, 1919, only charges that property of a German national which belonged to her when the Treaty came into force. At that date Mrs. Wolf had only a life interest restrained from anticipation. A restraint on anticipation may be regarded as an encumbrance on the life interest, and it is submitted that the property charged is subject to all the restrictions to which it was properly subject before the charge took effect. A clause restraining anticipation prevents the person entitled to the income for her separate use having the dominion until it becomes due: *Hood Barrs* v. *Heriot.* (1) The existence of the restraint prevents any effective charge. It could not have been the intention of the Legislature to alter trusts. The property of the German national here was one restrained from anticipation. That is charged by the Treaty of Peace Order, 1919, and the charge is only on such income as had accrued due at the time the charge took effect. Whenever the Legislature intends to interfere with a restraint on anticipation it uses express and not general words: see Conveyancing Act, 1881, s. 65; the Settled Land Act, 1882, s. 61; the Trustee Act, 1893, s. 45; Maxwell on the Interpretation of Statutes, 6th ed., p. 149.

G. B. Hurst K.C. and *O'Sullivan* for Mrs. Wolf's infant children. At the time the Treaty came into force the beneficial interests of the children were under their mother's marriage settlement and in default of appointment by her. The exercise of a power of appointment divests the estates limited in default of appointment and creates new estates. Therefore the estate which the children now hold under the appointment of June 13, 1921, was not held by them on January 10, 1920, and accordingly is not charged: *In re*

(1) [1896] A. C. 174.

RUSSELL J. 1922 RUSH, *In re.* WARRE *v.* RUSH.

Vizard's Trusts (1); *Sweetapple* v. *Horlock* (2); *Lovett* v. *Lovett* (3); *Attorney-General* v. *Earl of Selborne.* (4)

Clauson K.C. and *Bischoff* for the Public Trustee, as custodian of enemy property in England and Wales. The reversionary interests of Mrs. Metzler on January 10, 1920, although liable to be divested by the exercise of a power of appointment were property: *In re Jackson's Will* (5); and are therefore charged under the Treaty of Peace Order, 1919. Although Mrs. Wolf was restrained from anticipation, yet the life interest in the income under her marriage settlement when the Treaty came into operation belonged to her. Although Mrs. Wolf's method of receipt of, and right to deal with, the income was fettered, the fetter was one personal to herself and was destroyed by the charge. There was nothing in the Treaty of Peace Order, 1919, which would protect the property of a German national which was subject to a restraint on anticipation and such protection would be opposed to the whole object of the Order. The reversionary rights of Mrs. Wolf's children on January 10, 1920, were property, rights and interests which were charged, and the exercise of her power of appointment on June 13, 1921, was void because it was a "transfer, parting with, or otherwise dealing in a property, right or interest subject to the charge" which was forbidden by s. 1, sub-s. xvii., of the Treaty of Peace Order, 1919.

Cur. adv. vult.

Feb. 8. RUSSELL J. [after stating the facts, read the following written judgment:] The question is whether any and which of the beneficiaries are German nationals, and whether any and which of the interests to which such beneficiaries (being German nationals) are now entitled under these documents are charged by the Treaty of Peace Order, 1919.

The defendant, Mrs. Metzler, a daughter of Spencer Rush,

(1) (1866) L. R. 1 Eq. 667; L. R. 1 Ch. 588.
(2) (1879) 11 Ch. D. 745.
(3) [1898] 1 Ch. 82.
(4) [1902] 1 K. B. 388, 398.
(5) (1879) 13 Ch. D. 189.

was on January 10, 1920, entitled in reversion expectant upon the death of her father, and subject to her mother's interest in 300*l.* per annum out of income and in default of appointment by her father, to one-third of the trust funds comprised in the marriage settlement of 1876. On the same date she was entitled in reversion expectant upon the death of her father to one-third of the residuary estates of William Rush and Anna Spencer Rush; she was also entitled in reversion expectant upon the death of her mother to one-third of the said trust fund of 500*l.*, contingently on her surviving her mother. Mrs. Metzler is a German national and prima facie her interests are subject to the charge.

It was, however, urged on her behalf that on January 10, 1920, her interests were reversionary; that as to the 500*l.* trust fund her interest was contingent, and that as to her other interests they could have been defeated by an exercise by her father of his power of appointment. It was, accordingly, contended on her behalf that in those circumstances her interests were not property, rights or interests "belonging to" a German national. I cannot accept that view. If any authority is needed upon this point, it is to be found in *In re Jackson's Will.* (1) All the interests of Mrs. Metzler under her parents' marriage settlement and the two wills are charged by the Treaty of Peace Order, 1919.

There remain to be considered the interests of Mrs. Wolf and her two children. The children take nothing except under or by virtue of Mrs. Wolf's marriage settlement. On January 10, 1920, they were each entitled, subject to their mother's life interest, and subject to any exercise by her of her power to appoint a life or less interest in the trust funds to her husband, to a share in the trust funds contingently on attaining twenty-one or marrying; but this interest was liable to be defeated by an exercise by their mother of her power of appointment in favour of issue of the marriage. These children were and are German nationals, and, accordingly, on January 10, 1920, the interest of each of them

(1) 13 Ch. D. 189.

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(liable to be defeated as above mentioned) became subject to the charge.

On June 13, 1921, Mrs. Wolf exercised her power of appointment in favour of her two children. The appointment is revocable, and the deed expressly reserves to Mrs. Wolf the power of appointment in favour of her husband. So long as this appointment is unrevoked the trust in favour of the children in default of appointment does not come into operation. It is overridden. A different trust has commenced to operate in their favour since January 10, 1920. It is a different right, property or interest from that which belonged to them on that date; although no doubt the quantum of the interest is the same. In my opinion, the right, property or interest conferred upon the children under the appointment is not a right, property or interest which belonged to them on January 10, 1920; and it is not charged by the Treaty of Peace Order, 1919: see and compare *In re Vizard's Trusts* (1); *Sweetapple* v. *Horlock* (2); *Lovett* v. *Lovett* (3); and *Attorney-General* v. *Earl of Selborne.* (4)

It was urged that the exercise by Mrs. Wolf of her power of appointment must be treated as of no effect on the ground that it was a transfer, parting with or otherwise dealing in a property, right or interest subject to the charge, which is prohibited by the Treaty of Peace Order, 1919, s. 1, sub-s. xvii. I refer to the argument to show that it has not been overlooked; but by no stretch of language or imagination can I hold that the exercise of a special power of appointment is a transfer, parting with or otherwise dealing in the interest taken in default of exercise of the power.

The remaining interest to be considered is that of Mrs. Wolf. She was on January 10, 1920, entitled to a life interest in the property comprised in her marriage settlement. Her life interest was, as to the greater part of the property, a reversionary life interest expectant on the death of Spencer Rush. As to a small portion of the property, her mother

(1) L. R. 1 Eq. 667; L. R. 1 Ch. 588.
(2) 11 Ch. D. 745.
(3) [1898] 1 Ch. 82.
(4) [1902] 1 K. B. 388, 398.

had a life interest therein, and as to a further small portion, her mother had an interest therein during life until remarriage. The trust in favour of Mrs. Wolf under her marriage settlement is in the following words: "The trustees or trustee shall pay the income of the trust fund to the wife during her life for her separate use without power of anticipation whilst married." It was argued on her behalf that the restraint on anticipation prevented her life interest from being charged by the Treaty of Peace Order, 1919. In *Hood Barrs* v. *Heriot* (1) Lord Herschell considered the effect and meaning of a restraint on anticipation in the following words: "The introduction of a restraint on anticipation in settlements of property to the separate use of a married woman is of comparatively modern origin. It was decided in *Pybus* v. *Smith* (2) (in 1791) and other cases that, though property was settled upon trust to pay the income to a married woman for her separate use, free from the control of her husband, this did not prevent her from assigning her interest in such income, or charging it with the payment of her husband's debts. The object of settling it to her separate use became thus defeated. It is stated in a note to *Pybus* v. *Smith* (2) that these decisions suggested to Lord Thurlow, in a case where he was trustee, the introduction of a clause in restraint of anticipation. As far as I have been able to ascertain, the earliest form of the clause against anticipation provided that the trustees should, from time to time, pay the income to such person or persons, and for such intents and purposes, as the married woman, by writing signed with her own hand, should, notwithstanding her coverture (but so as the same was not by way of anticipation), direct or appoint, and in default of appointment, and in the meantime, pay the same into her proper hands: see *Chassaing* v. *Parsonage* (3), where it is stated that a clause of this nature had been introduced into these settlements, in consequence of the decision in *Pybus* v. *Smith*. (2) A clause in substantially the same form certainly continued in use for a considerable time. It will be observed

(1) [1896] A. C. 174, 177.
(2) (1791) 3 Bro. C. C. 340; and see 1 Ves. Jun. 189.
(3) (1799) 5 Ves. 15.

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that it expressly empowered the married woman to alienate the income after it became due, and authorized the trustees to pay it to her appointee. It was only when the appointment was by way of anticipation that it was prohibited. Such a provision was regarded as a sufficient protection for the wife by those who devised the restraint on anticipation. At all events, it is clear that they did not regard an assignment after the income became due as made by way of anticipation. I am, therefore, unable to agree with the view entertained by Kay L.J., that a restraint on anticipation by its nature forbids an alienation before the fund reaches the wife's hands although the income be due to her when the alienation is attempted. In more recent times the clause restraining anticipation has assumed different forms, but its purpose and effect have, I think, always been the same. That effect is well expressed by Lord Cottenham in *Rennie* v. *Ritchie* (1), where he said that it prevents the person entitled to the income for her separate use 'having the dominion till it becomes due.'" Mrs. Wolf contends that you must here treat the restraint on anticipation as being written out at length, that on January 10, 1920, all that she could have charged was the sum, if any, then presently due to her. In effect the argument is that no greater or more effective charge is conferred by the Treaty of Peace Order than Mrs. Wolf herself could effectively have given on January 10, 1920. In my opinion this contention is not well founded. The charge created is a statutory charge. Even though the lady is herself prevented from effectively dealing with the income except as to income actually due, the beneficial ownership of the income is in her and in nobody else. There may be a fetter on dominion but she is the sole beneficiary. The interest belongs to her in every sense. The reversionary rights to receive the income of the different funds which were vested in her on January 10, 1920, were property, rights and interests belonging to her according to the natural meaning of the words. Unless I am to read the Treaty of Peace

(1) (1845) 12 Cl. & F. 204, 234.

Order, 1919, as being subject to a proviso that the statutory charge thereby created in invitum shall only attach if and to the extent that the German national would himself be capable of creating the charge, I can see no reason for saying that that Order does not effectively charge in favour of this country these interests of Mrs. Wolf. There is nothing in the language of the Treaty of Peace Order, 1919, or in its aim and objects as disclosed therein, to suggest or warrant the implication of such a proviso, which would indeed exclude from the charge the property of German nationals whose incapacity voluntarily to create a charge arose from infancy, insanity, or other cause. It was argued that in various statutes where the Legislature intends to affect restraints on anticipation, it says so in plain terms. As instances, were cited the Conveyancing Act, 1881, s. 65; the Settled Land Act, 1882, s. 61; and the Trustee Act, 1893, s. 45. It appears to me, however, that the Treaty of Peace Order, 1919, stands in a different category of legislation. Its declared aim and object is to charge on property, within His Majesty's dominions and protectorates, which belongs to German nationals, compensation in favour of this country which has to be borne by their country. Such a charge should prima facie apply to all German nationals whose property is here; and I am not prepared to except from it the property of any German national unless compelled to do so by clear and express words in the Order, and none such are to be found. I am of opinion that the statutory charge created by the Treaty of Peace Order, 1919, attaches to these interests of Mrs. Wolf, notwithstanding the restraint on anticipation.

In the result I decide thus: The beneficial interests of the infant defendants under or by virtue of the appointment of June 13, 1921, are not subject to the charge. The following beneficial interests are subject to the charge—namely: (1.) The interests of the defendant Mrs. Metzler under the marriage settlement of 1876, under the will of William Rush, and under the will of Anna Spencer Rush. (2.) The interests of the infant defendants in default of appointment under

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the marriage settlement of 1901. (3.) The life interest of the defendant Mrs. Wolf under the marriage settlement of 1901.

Solicitors: *Williams & James; Cruesemann & Rouse; W. Norris & Co.; Theodore Goddard & Co.*

J. B. B. M.

C. A. 1921 EVE J. *June* 23. C. A. 1922 *Jan.* 17.

In re MELLOR.

ALVAREZ *v.* DODGSON.

[1920. M. 2924.]

Will—Construction—Residuary Gift—Direction to settle residuary Trust Fund—Contingent Life Interests—Vesting on attaining Twenty-five or Marriage—Right of Tenant for Life to Accumulations of Income on attaining vested Interest—Appeal—Notice by One Respondent of Intention to support Appeal—Right to be heard on Appeal—Rules of Supreme Court, Order LVIII., *r.* 6.

A testatrix by her will gave, devised and bequeathed all her real and personal estate not thereby otherwise disposed of to trustees upon trust to sell, call in and convert the same, and after paying her funeral and testamentary expenses and debts, and the legacies bequeathed by her will or any codicil thereto, to invest the residue of the said moneys, with power from time to time to vary such investments and to stand possessed of the said residuary trust moneys and the investments for the time being representing the same (thereinafter called the residuary trust fund) upon trust to pay certain annuities, and subject thereto in trust as to two-thirds thereof for the children of her niece living at her (the testatrix's) death, who being males attained the age of twenty-five years or being females attained that age or married in equal shares. Then after providing that the share of any child dying under the age of twenty-five years without having been married should accrue to the other children's shares, the testatrix declared that the share or shares original or accruing to which each of such children acquiring a vested interest should be entitled in the residuary trust funds should be settled upon trusts under which each child took a life interest only.

The plaintiff was a daughter of the testatrix's niece who had married, and she took out this summons to have it determined whether or not she was absolutely entitled to the accumulations of the income of her share between the date of the testatrix's death and of her attaining a vested interest:—

Held, by Eve J. and the Court of Appeal, that the plaintiff's share in the residuary trust funds directed to be settled included not only the

corpus but also the accumulations of income of the share, and that the plaintiff was therefore not entitled to the accumulations but only to income produced from their investment.

Green v. *Ekins* (1742) 2 Atk. 472; *Countess of Bective* v. *Hodgson* (1864) 10 H. L. C. 656; *In re Bowlby* [1904] 2 Ch. 685 followed.

Held, also, by the Court of Appeal, that a respondent could not by giving a notice under Order LVIII., r. 6, claim to be heard in support of an appeal.

ORIGINATING SUMMONS.

Judith Mellor, by her will dated January 4, 1905, after appointing trustees and executors thereof and bequeathing certain legacies and annuities therein mentioned, gave, devised, bequeathed and appointed all her real and personal estate not thereby otherwise disposed of (including certain funds over which she had a power of appointment) unto her trustees upon trust that her trustees should sell, call in and convert into money the same or such part thereof as should not consist of money and should out of the moneys produced by such sale, calling in and conversion and with and out of her ready money pay her funeral and testamentary expenses and debts and the legacies bequeathed by that her will or any codicil thereto and invest the residue of the said moneys with power for her trustees from time to time to vary such investments and should stand possessed of the said residuary trust moneys and the investments for the time being representing the same (thereinafter called the residuary trust fund) upon trust to pay the annuities therein referred to and subject thereto in trust as to two-thirds thereof for the children of her niece Mary Matilda Ashworth living at her (the testatrix's) death who being male attained the age of twenty-five years or being female attained that age or married under that age in equal shares and so that the share or shares as well original as accruing of any such children dying under the age of twenty-five years without having been married should accrue to the others of such children and if there were only one such child the whole to be in trust for that one child Provided always and the testatrix declared that the share or shares original and accruing to which each of such children acquiring a vested interest should be entitled in the residuary

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trust funds should be held by her trustees upon the trusts following (that was to say) upon trust to pay the income thereof to the same child for his or her life and after the death of the same child then as to the principal of his or her share in the residuary trust funds with the future income thereof the same should be held in trust for all the children of the same child who being male attained the age of twenty-one years or being female attained that age or married in equal shares and if there were only one such child the whole to be in trust for that one child and in case there should be no issue of the same child who being male attained the age of twenty-one years or being female attained that age or married then the share of the same child should be held in trust for the other children of the said Mary Matilda Ashworth who being male attained the age of twenty-five years or being female attained that age or married in equal shares and so that the share or shares accruing to each or any child of the said Mary Matilda Ashworth under that trust should be subject to the trusts thereby declared (including the now reciting trust) concerning the original share of such children under her will. The testatrix then directed that her trustees should hold the remaining two-sixth parts of her residuary trust funds upon trusts for the benefit of other members of her family. The will contained no maintenance clause.

The testatrix died on May 3, 1910.

Mary Matilda Ashworth had seven children of whom one died in infancy in the lifetime of the testatrix. The other six children were (1.) the defendant John Ashworth who attained the age of twenty-one on or about November 19, 1910, and was still living and had had only one child (now about four years old); (2.) George Bertram Ashworth who attained the age of twenty-one years on or about March 2, 1914, and died a bachelor intestate on August 10, 1916; (3.) Roger William Ashworth who attained the age of twenty-one years on or about October 10, 1915, and died a bachelor on March 26, 1918; (4.) the plaintiff Grace Eileen Ashworth who attained the age of twenty-one years on September 13, 1919; (5.) the defendant Sybil Mary Ashworth who was now in her twentieth year; and

(6.) Enid Ruby Rosalind Ashworth who was now in her seventeenth year.

Mary Matilda Ashworth died on January 22, 1919.

The plaintiff Grace Eileen Ashworth was married to Nathaniel Alvarez on March 10, 1920, and had one child the defendant Joan Rachel Mary Alvarez.

It appeared from the draft balance sheet furnished by the trustees that down to May 3, 1920, the accumulations of the income of the plaintiffs' shares original and accruing amounted to 12,631*l.* 1*s.* 11*d.*

The present summons was taken out by the plaintiff Grace Eileen Alvarez against the trustees of the will and the defendants John Ashworth, Sybil Mary Ashworth, Enid Ruby Rosalind Ashworth and Joan Rachel Mary Alvarez the infant daughter of the plaintiff asking (inter alia) that it might be determined whether the income of the share of the plaintiff in the said residuary estate between the death of the testatrix and the marriage of the plaintiff (*a*) belonged to the plaintiff and ought to be paid to her or (*b*) ought to be treated as an addition or accretion to the capital of the said share.

The summons was heard before Eve J. on June 23, 1921.

Gover K.C. and *P. F. S. Stokes* for the plaintiff. The accumulations of income belong to the plaintiff absolutely. The plaintiff's share being a share of residue, it carries the income between the death of the testatrix and the happening of the contingency: *Countess of Bective* v. *Hodgson* (1); *In re Taylor.* (2) It is however, on the construction of this will, only the corpus of the share that is settled. Any argument to the contrary must be based on *In re Bowlby* (3) where *In re Scott* (4) was disapproved. In both those cases, however, s. 43, sub-s. 2, of the Conveyancing Act, 1881, applied. It does not do so here, because the contingency was attaining twenty-five and not attaining twenty-one years of age. *In re Bowlby* (3) was discussed in *In re Boulter.* (5)

(1) 10 H. L. C. 656.
(2) [1901] 2 Ch. 134.
(3) [1904] 2 Ch. 685.
(4) [1902] 1 Ch. 918.
(5) [1918] 2 Ch. 40, 49.

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Clayton K.C. and *Meyrick Beebee* for the trustees.

Dighton Pollock for John and Sybil M. Ashworth.

G. E. Timins for Enid R. R. Ashworth.

Roope Reeve for Joan R. M. Alvarez. This case is covered by the dicta in *In re Bowlby* (1), and the plaintiff is not entitled to the accumulations which go as an accretion to the settled share. It makes no difference that the plaintiff's share is a share of residue. A contingent legacy carries all its accretions from the moment it is set aside : *In re Boulter.* (2) The dicta in *In re Bowlby* (1) cannot be distinguished on any such ground : compare *In re Woolf.* (3)

Gover K.C. in reply.

EVE J. [after stating the effect of the testatrix's will down to the trust for Mary Matilda Ashworth's children]. Pausing there, that is a gift in favour of a class of children, that is to say, such of the children of Mary Matilda Ashworth as should be living at the death of the testatrix and being male should attain the age of twenty-five, or in the case of females, attain that age or marry. The contingencies are, living at the date of the testatrix's death, attaining the age of twenty-five, or in case of females, attaining that age or marrying. " Under such a gift," to use Buckley J.'s language in *In re Scott* (4), " the income is accessory to the capital and belongs contingently to the legatees in whose favour the contingent gift is made." The plaintiff is one of the class, and on March 10, 1920, she was married, and thereupon acquired a vested interest in a share of the residue which consisted of her own one-sixth, and certain shares which had accrued to her by reason of the prior deaths of two brothers under the age of twenty-five and bachelors.

The question is, is she entitled absolutely to certain accumulations of income which were made before her interest vested in respect of her original and accrued shares ? On so much of the will as I have so far referred to, the matter is beyond controversy. A gift of residuary personal property, or of

(1) [1904] 2 Ch. 685.
(2) [1918] 2 Ch. 40, 44.
(3) [1920] 1 Ch. 184.
(4) [1902] 1 Ch. 918, 923.

a share of residuary personal property, on a future contingency carries with it the intermediate income, and as soon as the right to the residue or share of residue is vested there is vested also the right to the accumulated intermediate income. But the testatrix by her will goes on to make a settlement of the shares of children acquiring vested interests, and she does this by means of a proviso in these words: "Provided always and I declare that the share or shares original and accruing to which each of such children acquiring a vested interest shall be entitled in the residuary trust fund shall be held by my trustees upon the trusts following." Putting them shortly, those trusts are for the legatee for life with remainder to his or her children.

The question I have to determine is, does the provision relating to the settlement of the vested share of any child alter the right of the child to take and receive for his or her own use and benefit the accumulations of intermediate income? It has been argued that it does not because, according to the true construction of the declaration by which the settlements are brought about, that which is the subject matter of each settlement is the share of the child in the residuary trust moneys and the investments for the time being representing the same, and does not extend to income which is not part of the residuary trust moneys and the investments for the time being representing the same, but represents something which these moneys have earned in the period which has elapsed between the realization and investment of the residue and the date of the vesting of the legatee's interest. I am not prepared to adopt that as the correct construction. I think when the residuary trust moneys and investments are spoken of, and are compendiously called the residuary trust fund, that fund must be taken to include the investments which from time to time represent the residuary trust moneys, so that if the original share of each child in these residuary trust moneys has been added to by the investments and accumulations of income, those additions would be properly included as part of the original share, and in the case of accumulations of the income of

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accruing shares, as part of the accruing shares, to which each child acquiring a vested interest would be held to be entitled.

If that view as to the construction is right, that disposes of the matter, but it may very well be that it is not the correct construction, and that, in substance, the declaration by which settlements are brought about is a direction to settle the aliquot share of each child in the residuary trust moneys produced by the conversion directed by the testatrix in her will. Then the question arises whether, in that case, this accumulated income is to be treated, as between the parties entitled under the settlement for life and those entitled in remainder, as income or capital. I think I am bound, on the authorities as they stand, to hold that even in that case those accumulations would have to be treated as capital. It is true that the exact point I have to decide has not been the subject matter of direct decision, because in *In re Scott* (1) there was introduced an element which is wholly inapplicable here. In that case the construction of s. 43, sub-s. 2, of the Conveyancing Act, 1881, was a material factor. In the present case by reason of the vesting being postponed until the legatees attain the age of twenty-five, that section has no application. What I have to ask myself is whether, having regard to the judgments which were pronounced, more particularly in the Court of Appeal, in the case of *In re Bowlby* (2), it can really be stated with confidence that all it decided was that, in circumstances where s. 43 applied, accumulations of intermediate income must be treated as accretions to capital. I do not think, reading those judgments fairly, that this is the true result. I think the view of the Court was that at the moment when the interest of the legatee vested, the accumulations of income must, if that legatee's interest be limited to a life interest, be treated as capital, and not be treated as belonging to the tenant for life absolutely. The matter is not altogether in a satisfactory position so far as the authorities go, but I should be disregarding a good deal of what is said in the judgments in

(1) [1902] 1 Ch. 918. (2) [1904] 2 Ch. 685.

In re Bowlby (1), which was not actually necessary for the determination of that case, were I to hold in a case like the present, where the Act of 1881 has no application, that the accumulated income should be treated differently from the manner in which it was held that it ought to be treated in cases in which the statute applies.

I hold, therefore, that on the true construction of this will, and in the events which have happened, the accumulations of income in the intermediate period between the death of the testatrix and the vesting of the plaintiff's share must be added to the settled share, and that the plaintiff is only entitled to the income produced by the accumulated income.

H. C. G.

The plaintiff appealed.

C. A.

On December 1, 1921, the defendant Enid R. R. Ashworth gave a notice under Order LVIII., r. 6, to the plaintiff and the other defendants of her intention to support the plaintiff's appeal.

The appeal was heard on January 17, 1922.

Gover K.C. and *P. F. S. Stokes* for the appellant. The first question is whether the subject matter settled under the proviso in the trust for the children of Matilda Ashworth is the shares only and not the accumulations of income. The case does not come within the Conveyancing Act, 1881, and there is no question of maintenance. It is submitted (1.) that under the primary gift the appellant on her marriage became entitled to one-fourth of the corpus of the residuary fund and one-fourth of the accumulated income. The proviso settled only the share of the corpus, which then became vested and did not settle her share of the accumulated income. She therefore takes that share of the accumulations under *Lassence* v. *Tierney*. (2) (2.) Even if the direction in the proviso to settle covers the income of the share the direction is to pay the appellant the income of the subject matter for her life and these accumulations represented income which

(1) [1904] 2 Ch. 685. (2) (1849) 1 Mac. & G. 551.

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had accumulated during her life and which were therefore payable to her. What is held by the trustees is the appellant's share in the residuary fund which unlike a legacy carries the accumulated income: *In re Taylor* (1); *Green* v. *Ekins*. (2)

[*Hewitt K.C.* referred to Jarman on Wills, 6th ed., vol. i., p. 953.]

In *Green* v. *Ekins* (3) the question was between an intestacy and residue, that is whether the income was covered by the residuary gift. The accumulated income was part of the estate bequeathed.

[WARRINGTON L.J. referred to *Countess of Bective* v. *Hodgson*. (4)]

In that case there was no child in existence at the date of the action and consequently the contingency had not happened. The only question there was as between testacy and intestacy.

Assuming, however, that the subject matter of the gift includes accumulations of income as well as corpus, then it is submitted on the construction of this will that the accumulations of income retain their character of income and that the appellant takes them as well as the accruing income.

[YOUNGER L.J. In your view the postponement till twenty-five is merely a postponement of receipt and that the appellant takes the whole of the income on attaining twenty-five or marriage.]

That is so. The facts in *In re Scott* (5) were exactly the same as those in this case and the decision covers both points.

[LORD STERNDALE M.R. referred to *In re Bowlby*. (6)]

That was not a case of a residue but of a pecuniary legacy. The real decision there was that the view of Buckley J. in *In re Scott* (5) of s. 43 of the Conveyancing Act, 1881, was wrong. The only direct authority which covers this case is

(1) [1901] 2 Ch. 134.
(2) 2 Atk. 472, 475.
(3) 2 Atk. 472.
(4) 10 H. L. C. 656.
(5) [1902] 1 Ch. 918.
(6) [1904] 2 Ch. 685, 709.

In re Scott (1) and it is submitted that the view there expressed by Buckley J. is the true one.

One main submission however is that in this will the direction to pay the income to the tenant for life applies as well to the accrued income as to the accruing income.

Romer K.C. and *G. E. Timins* for the respondent Enid R. R. Ashworth. This respondent has given a notice under Order LVIII., r. 6, of her intention to support the appeal.

[LORD STERNDALE M.R. That rule deals with cross-appeals.]

This respondent desires that the order of the Court below should be varied. Unless she can now be heard in opposition to the order she will be precluded from subsequently raising the point without going to the House of Lords.

[LORD STERNDALE M.R. referred to *Ex parte Payne.* (2)]

[WARRINGTON L.J. You have not given notice of a cross-appeal.]

[YOUNGER L.J. Can you, Mr. Romer, get instructions to appear on behalf of the appellant ?]

Yes, that can be done.

[LORD STERNDALE M.R. I think that had better be done, as I do not wish to upset the practice of the Court.]

[*Romer K.C.* was thereupon instructed to appear with *Gover K.C.* for the appellant and proceeded to argue the case on her behalf.]

The real question is whether as a matter of construction the accumulated income is to be treated as part of the residue.

It has been held that when a residue is given on a contingency what passes is the same as what would pass in the case of a vested gift. The income of residue is not part of the residue and is not divided in the same way as the residue. It is submitted that a testator may give the income of a residue on a contingency to a person and that the person to whom it is given on the happening of the contingency takes it as from the death of the testator and is thenceforth in the same position as if it had them vested. He is entitled on the

(1) [1902] 1 Ch. 918. (2) (1879) 11 Ch. D. 539.

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happening of the contingency to the income whenever it may have accrued.

In *In re Scott* (1) Buckley J. was of opinion that the view now submitted was correct. In *In re Bowlby* (2) Mr. Vaughan Hawkins in argument stated that though in form the appeal in that case was from a decision of Joyce J. it was really brought for the purpose of asking the Court to review the decision of Buckley J. in *In re Scott* (1), which Joyce J. followed. In none of the cases cited by him did the question arise between tenant for life and remainderman.

When once the contingency happens there is no difference between a vested and a contingent gift. Here it is submitted that the income never formed part of the residuary fund.

Dighton Pollock for the respondents John and Sybil Ashworth; *E. P. Hewitt K.C.* and *Roope Reeve* for the respondent Joan R. R. Alvarez and *Meyrick Beebee* for the respondent trustees were not called upon to argue.

LORD STERNDALE M.R. This is an appeal from a decision of Eve J. on the will of a lady of the name of Mellor. The appellant contends that she is entitled to certain income mentioned in the will, and arising out of the investments of the residuary estate of the testatrix. Mr. Romer, appearing for a respondent, but a respondent whose interests might be prejudiced if this judgment stands, wished to be heard on behalf of that respondent by virtue of a notice which he had given purporting to be under Order LVIII., r. 6, saying that he would, upon the hearing of the appeal, ask for a variation of the order which was really an entire reversal of the order. We did not think he was entitled to be heard, and we did not think—at least I did not—that Order LVIII., r. 6, was ever intended to apply to a case of this description. It deals with the question whether there need be a notice of a cross-appeal, or whether merely a notice that the point would be argued is sufficient without formal notice by way of cross-appeal; and I do not think that case comes within the rule. In fact, Mr. Romer's client's case was not before us at all,

(1) [1902] 1 Ch. 918. (2) [1904] 2 Ch. 685, 689.

but as we think Mr. Romer was quite well founded in saying that this decision practically deprived his client of the right to be heard, and that he would not be able to take proceedings successfully without going to the House of Lords, we thought it well that he should be heard in some way. The difficulty was got over by his being instructed to argue the case with Mr. Gover on behalf of the appellant; and we have heard him on that footing. I only wish to say that we allowed that under the special circumstances of this case, and I do not wish it to be taken that, whenever a respondent desires to support the appellant's case, it will be sufficient during the hearing of the appeal for the respondent's counsel to say: "I cannot appear for my own client, but the appellant is quite satisfied that I should argue the case for him." This is not to be taken as a precedent to enable this course to be taken in an ordinary case, and I do not wish to do anything to disturb the practice of this Court of refusing to hear a respondent in support of an appeal.

Having heard both the appellant and, in fact, that respondent who agrees with the appellant, I am of opinion that the learned judge's decision is quite right. There were two points argued before him—the first, upon the construction of the will, was whether the settlement thereby directed to which I shall refer, was a settlement of both corpus and accumulated income, or was merely a settlement of the corpus leaving the accumulated income to be dealt with, not by any express provision of the will but by the ordinary law. The second point was whether, assuming that it was a settlement of the corpus, and the corpus alone, the accumulations of the income were to be paid to the appellant. If the decision of Eve J. on the first point be right I quite agree with him that the decision on the second point does not arise; and as I am of opinion that the decision on the first point was right, it is not my intention to say anything on the second.

The clauses in the will under consideration are as follows: [His Lordship stated the provisions of the will down to the trust for the children of Mary Matilda Ashworth, and continued:] As the learned judge said, pausing there, if

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that were the end of the gift when the contingency of marriage or the attainment of twenty-five occurred the children who were the objects of the gift would take the income which had accumulated during the period between the death of the testatrix and the happening of the contingency.

But the will continues: [His Lordship then read the proviso providing for the settlement of the shares of the children who acquired vested interests, and continued:]

The first question depends upon this. It is contended that the expression "the residuary trust funds" in the clause following the investment clause where they are mentioned as "hereinafter called the residuary trust fund" refers only to the corpus of the investment, and does not refer to the accumulations of income; that accumulations of income are no part of the residuary trust fund, and, that being so, the expression "the residuary trust fund" in the subsequent clause means the same thing, and that it must be read as meaning corpus only, and not as including the accumulations of income. The learned judge has held that that is wrong, and that in each position in the will the "residuary trust fund" and "residuary trust funds" must be held as including not only corpus, but also the accumulations of income. I agree with that view, and I agree with it in substance for the reasons given by the learned judge, and, therefore, I do not think it necessary to repeat them. I wish to say that it seems to me to be in accordance with the principles of the decisions to which we have been referred—namely, *Green* v. *Ekins* (1), a decision of Lord Hardwicke, and *Countess of Bective* v. *Hodgson* (2), both in the Court of Appeal and the House of Lords, and also with the dicta, if they may be called dicta, or expressions of opinion of this Court in *In re Bowlby* (3), and, therefore, I think the learned judge is right on the first point, and, that being so, the second point does not arise. The appeal, therefore, will be dismissed.

WARRINGTON L.J. I am of the same opinion. With regard to the capacity in which Mr. Romer has been heard, I have

(1) 2 Atk. 472.
(2) (1863) 1 H. & M. 376; 10 H. L. C. 656.
(3) [1904] 2 Ch. 685.

nothing to add to what has been said by the Master of the Rolls. I will only say that I agree with what the Master of the Rolls has said as to the difficulty of allowing Mr. Romer to be heard in such a case as the present under the provisions of Order LVIII., r. 6.

On the main question I am also of opinion that the decision of Eve J. is right. The question is really this—what was it that the testator directed should be held upon trust to pay the income thereof to the daughter for life, and then upon trust for her children and so forth? On acquiring by her marriage a vested interest in her share of the residuary estate the appellant also became entitled as part of that share to income which had accumulated since the death of the testatrix. Her share in the estate was to be settled—did that direction to settle include the accumulations of income or did it not? That question has been dealt with in many previous authorities, not directly under the circumstances which arise here, but various judges of great eminence have given their opinion as to why it is, in such a case as the present, that a person contingently entitled to a share of the residue of personal estate, or of a mixed fund, becomes entitled to the income which has accrued and been accumulated during the suspense of the contingency. We have it first in *Green* v. *Ekins* (1) before Lord Hardwicke, and the reasons he gives are important, because they seem to me to be the foundation of what has been said in other cases. There speaking of personal estate he says: "The residue of a personal estate is nothing fixed, but a fluctuating interest, and if the personal estate is increased by any event after the death of the testator, it is part of the residue, and will pass as such; why then not the interest of that residue, for that interest is assets, and part of the estate." Then he goes on to state certain considerations in support of that view. That means this, that when, as here, the testatrix directs her trustees to sell and convert into money and invest the residue of the moneys forming part of her personal estate, that direction extends to any income which was accruing during the suspense of the

(1) 2 Atk. 472, 476.

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actual vesting, and, therefore, when she says that they are to stand possessed of the residuary trust moneys, and calls those residuary trust moneys "residuary funds" they are to stand possessed of what originally at her death formed part of her estate, and what has become part of her estate by being income derived from it subsequently to her death. Exactly the same view is expressed in different language by Lord Westbury L.C. in *Countess of Bective* v. *Hodgson.* (1) He says: "Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal." In the same case in the Court below (2) Wood V.-C. says: "If I give the whole of my personal estate to be invested on trusts—similar to the trusts of these two-thirds—all the interim income will have to be applied exactly in the same manner as the capital in the purchase of real estate." In that case it was to be applied in the purchase of real estate to be held upon certain trusts. So far it is quite true that, for simplicity, I have drawn no distinction between a direction to settle the whole of the residuary estate, and a direction to settle a share of it, but, in my opinion, there is no distinction between those two cases. The first is rather more simple to express, but there is no substantial difference. There again fortunately both in the Court below before Wood V.-C., and in the House of Lords, the point was dealt with by the learned judges who heard that case. I need not refer to the judgment of Wood V.-C. It is enough to refer to the speech in the House of Lords of Lord Westbury (3): "The rules which are applicable to a gift of the entirety of the residue will be applicable to the gift of an undivided part of the residue."

It is said that in those several cases the question did not arise as between tenant for life and persons interested in the

(1) 10 H. L. C. 656, 665.
(2) Sub nom. *Hodgson*, v. *Earl of Bective*, 1 H. & M. 376, 400.
(3) 10 H. L. C. 656, 666.

fund after the tenant for life's death; that point did arise in *In re Scott* (1), and in that case Buckley J. expressed an opinion not in accordance with the view I have just expressed. But in the subsequent case of *In re Bowlby* (2) that opinion of Buckley J. was considered in the Court of Appeal, and both Romer L.J. and Cozens-Hardy L.J. said they did not agree with Buckley J.'s view, and they thought that his erroneous view on that point had led him to an erroneous decision which was not strictly on the point at all. In my opinion what this will directs shall be settled is the share to which the appellant became entitled on her marriage, that is to say, when the suspense of vesting came to an end; and what she then became entitled to was what one may call her original share, and the increase of it by the accumulations of the intermediate income. The whole of that was directed to be settled.

In my opinion the learned judge was right in the conclusion at which he arrived, and this appeal ought to be dismissed.

YOUNGER L.J. I agree. I think that on the true construction of this will the fund to the income of which the appellant became entitled on her marriage as tenant for life was the entire fund to which she would have been absolutely entitled at that moment had there been in the will no subsequent directions for settlement.

Appeal dismissed.

Solicitors: *Ridsdale & Son; Rawle, Johnstone & Co., for H. Booth & Sons, Oldham; Hatchett-Jones, Bisgood, Marshall & Thomas, for Walter Dodgson, Leeds.*

(1) [1902] 1 Ch. 918. (2) [1904] 2 Ch. 685.

W. I. C.

C. A.
1922
Feb. 1, 2.

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Small Holdings—Allotments—Acquisition of Land—Borough Council—Order for compulsory Hiring—Breaking up of Pasture—Consent of Board of Agriculture and Fisheries—Small Holdings and Allotments Act, 1908 (8 *Edw.* 7, *c.* 36), *ss.* 25, 39, 61; *Sch. I., Part II., para.* 2 (*b*)—*Land Settlement* (*Facilities*) *Act,* 1919 (9 *& 10 Geo.* 5, *c.* 59), *ss.* 1, 25; *Sch. I., Part II.*

Sch. I., Part II., clause (2) (*b*), of the Small Holdings and Allotments Act, 1908, as amended by s. 25, sub-s. 1, and Sch. II. of the Land Settlement (Facilities) Act, 1919, provides that an order made by the council of a borough, urban district or parish, for the compulsory hiring of land for the purpose of providing allotments "shall not authorise the breaking up of pasture unless the Board" (of Agriculture and Fisheries) "are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings or allotments, as the case may be, cannot otherwise be successfully cultivated."

Where an order had been made under the Acts by a borough council for the compulsory hiring for allotments of a piece of land consisting entirely of pasture:—

Held, that, in considering whether the breaking up of the pasture should be authorized, the Board must have regard to the particular piece of land alone, and need not be satisfied that there was no other land in the neighbourhood which could be successfully cultivated as allotments without the breaking up of pasture.

APPEAL from a decision of the Vice-Chancellor of the Lancaster Palatine Court dismissing a motion for an injunction to restrain the defendants until the trial of the action or further order from entering upon a plot of land belonging to the plaintiff, which the defendants had purported to acquire by compulsory hiring under an order made by them on June 1, 1921.

The plaintiff, Sir Lees Knowles, Bart., was the owner of a small farm of some seventeen acres known as Somerville Farm, Duchy Road, Pendleton.

On June 1, 1921, the defendants, the Council of the Salford Corporation, made an order for the compulsory hiring of a portion of the plaintiff's farm containing 14,000 square yards or thereabouts, and consisting entirely of pasture.

The order of June 1, 1921, purported to be made under the Small Holdings and Allotments Acts, 1908 to 1919. (1)

(1) Sect. 25, sub-s. 1, of the principal Act of 1908 (8 Edw. 7, c. 36), under the heading "Powers of Councils in Relation to the Provision of Allotments," provides:—"The council of a borough, urban district, or parish may, for the purpose of providing allotments, by agreement purchase or take on lease land, whether situate within or without their borough, district, or parish."

Sub-s. 2: "If a council are unable to acquire by agreement, and on reasonable terms, suitable land for the purpose of allotments, they may acquire land compulsorily in accordance with the provisions of this Act relating to compulsory acquisition of land."

Sect. 39, sub-s. 2, under the heading "Acquisition of land," provides:—"Where a council propose to hire land compulsorily, the council may submit to the Board an order for the compulsory hiring of the land specified in the order for a period not less than fourteen nor more than thirty-five years, and the provisions of Part I. of the First Schedule to this Act shall apply to the order in like manner as it applies to an order for compulsory purchase, with the substitution of 'hiring' for 'purchase' and with the modifications set out in Part II. of that Schedule."

Sub-s. 3: "An Order under this section shall be of no force unless and until it is confirmed by the Board, and the Board may, subject to the provisions of the First Schedule to this Act, confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall become final and have effect as if enacted in this Act; and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

Sect. 61 of the principal Act provides that for the purposes of the Act the expression "allotment" includes a field garden.

Sch. I., Part II., of the principal Act, entitled "Provisions as to the Compulsory Hiring of Land by a Council," para. 2, provides:—

"The Order authorising the land to be hired compulsorily shall determine the terms and conditions of the hiring other than the rent, and in particular . . . ."

Para. (*b*) in terms refers only to small holdings, but by a minor amendment contained in the Second Schedule to the Act of 1919 it was made expressly applicable to allotments. As amended para. (*b*) provides that the Order

"shall not authorise the breaking up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings or allotments as the case may be cannot otherwise be successfully cultivated."

Sect. 1 of the Land Settlement (Facilities) Act, 1919, provides:—

"Any order for the compulsory acquisition of land which is duly made after the date of the passing of this Act and before the expiration of three years from that date by a Council under the Small Holdings and Allotments Act, 1908 (hereinafter referred to as the principal Act) need not, except as otherwise expressly provided by this Act, be

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The order of June 1, 1921, set out a draft lease from the plaintiff to the defendants of the land in question and this draft contained a covenant by the lessee: "to cultivate the demised land in a proper manner and not to break up pasture except in accordance with paragraph (2) (*b*) of Part II. of the First Schedule to the Small Holdings and Allotments Act, 1908."

After making the order of June 1, 1921, the council through its town clerk received from the secretary of the Ministry of Agriculture and Fisheries, the following letter dated June 7, 1921:—

"SIR,

"I am directed to refer to your letter of the 2nd inst. regarding the Order made by your Council for the compulsory hiring for the purposes of allotments of certain pasture land in Duchy Road and to say that the Minister is satisfied that the circumstances are such that the proposed allotments cannot be successfully cultivated in this case unless the pasture is broken up.

"I am, Sir,

"Your obedient servant,

"G. L. MITCHELL."

On June 11, 1921, the council served notices to treat on the plaintiff and on the tenant of the farm or his partner on his behalf, and an arbitration under these notices had been held or was in course of being held, under protest so far as the plaintiff was concerned.

On July 10, 1921, the agents of the plaintiff wrote the following letter to the secretary of the Ministry:—

"DEAR SIR,

Small Holdings and Allotments Acts, 1908–1919, Land in Duchy Road, Pendleton, belonging to Sir Lees Knowles.

"Referring to our letter to you of the 12th inst. and to which we have not yet received a reply, we have now been

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submitted to or confirmed by the Board of Agriculture and Fisheries, but shall have effect as if it had been so confirmed."

informed by the Town Clerk of Salford that the consent of the Ministry of Agriculture and Fisheries to the order made by the Corporation of Salford is contained in a letter dated the 7th June, 1921, from your department to the Town Clerk of Salford."

Then the above letter was quoted.

"We wish to point out to you that the consent is not in accordance with the provisions of the Act. The Small Holdings and Allotments Act, 1908, Schedule I., Part II., sub-section 2 (*b*) provides that the Order 'shall not authorise the breaking of pasture unless the Board are satisfied that it can be broken up without depreciating the value of the land or that the circumstances are such that small holdings cannot otherwise be successfully cultivated.'

"According to the above mentioned letter from your department to the Corporation of Salford, the Board are merely satisfied that pasture land cannot be used for allotments without breaking it up, which we respectfully submit is self-evident, but is not what is required by the Act. We would therefore ask you to communicate with the Corporation of Salford and withdraw the consent which was given until your Board can be satisfied in accordance with the provisions of the Act, and that before they give their consent they should give an opportunity to Sir Lees Knowles to be heard on the matter as one of the persons interested in the land."

On August 5, 1921, the secretary of the Ministry replied as follows :—

"GENTLEMEN,

I am directed to refer to your letters of the 14th and 19th ult. regarding the Order made by the Salford Corporation for the compulsory hiring under the provisions of the Small Holdings and Allotments Acts, 1908-1919, of certain land in Duchy Road, Pendleton, belonging to Sir Lees Knowles and to say that Part 2 of the First Schedule to the Small Holdings and Allotments Act, 1908, as amended by the Land Settlement (Facilities) Act, 1919, provides that an Order authorising the hiring of land compulsorily shall not authorise the breaking up

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of pasture unless the Ministry is satisfied that it can be so broken up without depreciating the value of the land or that the circumstances are such that small holdings or allotments, as the case may be, cannot otherwise be successfully cultivated.

"In the Ministry's opinion the phrase 'the circumstances are such that small holdings or allotments as the case may be cannot otherwise be successfully cultivated' has reference only to the particular piece of land compulsorily hired by a Council. Inasmuch as the Ministry is satisfied that the land in question cannot be successfully cultivated as allotment gardens unless it is broken up the Ministry has given its consent to the Council's application to break up the land."

The plaintiff then moved before the Vice-Chancellor of the Palatine Court for an injunction that the defendants might be restrained until the trial of this action or further order from entering on the plot of land in question.

Counsel for the plaintiff contended that the Court ought to grant this injunction on the ground that the order of June 1, or at all events the putting into force of the compulsory powers purported to be conferred by it, was in contravention of the provisions of para. 2, sub-para (*b*), of the second part of the First Schedule of the Act of 1908, for the following reasons :—

(1.) Because the Board had not been satisfied before the order was made that the circumstances were such that allotments could not otherwise be successfully cultivated.

(2.) Because the Board ought to be satisfied that allotments in the neighbourhood could not be successfully cultivated without breaking up the pasture, and not only that allotments on the land to be hired under the order could not otherwise be so cultivated.

On December 12, 1921, the learned Vice-Chancellor, after stating the facts as above set out, said that he had come to the conclusion that neither of the above objections was well founded. With regard to the first objection he could find nothing in the language of sub-para. (*b*) to justify the conclusion that the Board must be satisfied on the points mentioned before the order was made. He thought that the provisions of the sub-paragraph were complied with if the

Board was so satisfied before the pasture was broken up. The words " unless the Board is satisfied," etc., notified or referred to the words " breaking up " rather than to the word " authorise " ; but whether this was so or not as a matter of strict grammar, he thought the substance of the sub-paragraph was that the order must be so framed that pasture could not be broken up unless the Board was satisfied on the points mentioned, and that the condition that the Board must be so satisfied could not be read as a condition precedent to the making of an order which might ultimately involve breaking up of pasture. Taking the principal Act as it stood before it was amended, the Vice-Chancellor thought that the order of events contemplated by the Act was as follows. First there should be an order by the Council, next that the order should be submitted to the Board for confirmation and be confirmed by them, and lastly that the Council should put in force its compulsory powers by notice to treat, and all consequential steps. It seemed to the Vice-Chancellor that it followed that it was contemplated that the Board should be satisfied as to the necessity of breaking up pasture after the making of the order, either when they confirmed it or subsequently ; for it could hardly have been contemplated that the Board should give its sanction to one clause in a proposed order before it was made when it had, after the order was made, to consider whether it should be confirmed or not.

It was true that under the amending Act of 1919 the confirmation by the Board was not required at the date of the order in question, but this was merely by virtue of a temporary provision and in any case the alteration of the principal Act in that respect would not, in his opinion, make it necessary to satisfy the Board before the order was made if this had not been necessary under the principal Act as it originally stood

The second objection was based on the view that some such words as " in the neighbourhood " must be read into the paragraph after the words " small holdings or allotments as the case may be," with the result that the sub-paragraph prevented land being hired compulsorily for allotments if such

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allotments necessarily involved the breaking up of pasture unless the Board was satisfied there was not land other than pasture available in the neighbourhood.

It was to be observed that in the present case the draft lease scheduled to the order did prohibit the breaking up of pasture except in accordance with the sub-paragraph in question, and it was contended for the defendants that assuming that the construction of the sub-paragraph was that suggested by the plaintiff his remedy was an injunction against breaking up the pasture, and that the order and the exercise of the compulsory powers thereunder were valid in any event. But it was not necessary to determine that point because, in his opinion, the construction of the sub-paragraph contended for by the plaintiff was not the right one. He did not think any such words as were suggested should be read in.

What was contemplated by the Act was that the council should hire land compulsorily in order to relet for small holdings or allotments. The sub-paragraph provided, in effect, that pasture must not be broken up unless the Board was satisfied that small holdings or allotments could not otherwise be successfully cultivated. This was merely a provision restrictive of the use of the land hired by the council. Whether any particular piece of land could properly be included in an order for the compulsory hiring of land depended, he thought, mainly on s. 25 of the principal Act and in his opinion Part II. of the Second Schedule was not directed to this question. Sub-para. (*b*) presupposed that pasture land could properly be included in an order and the substance of the sub-paragraph was that any pasture so included must not be broken up unless the Board was satisfied that that was necessary for the proper cultivation of small holdings or allotments to be carved out of the land hired compulsorily.

It was strongly urged by the plaintiff's counsel that that could not be the true meaning, as allotments for field gardens could in no case be cultivated without breaking up any pasture comprised in the allotment; but the Vice-Chancellor

thought a sufficient answer to that argument was to be found in the fact that the whole of an allotment need not be devoted to the purposes of a field garden. The Act merely provided that the expression "allotment" includes a field garden, and he thought it was permissible that an allotment should be used wholly or partly for other purposes—e.g., for a hen run or for providing hay, or grazing for a goat or other beast. So that if an allotment originally consisted partly of pasture and partly of arable land it might be possible to cultivate the allotment successfully without breaking up any pasture. It is true that that construction might be said to be a little strained, but the alternative—namely, to read the sub-paragraph as meaning that the Board must be satisfied that there was no land other than pasture available for cultivation as allotments in the neighbourhood, seemed to him to be doing much greater violence to the language of the section.

Taking the view which he had expressed it was not necessary to consider the further points raised by the defendants, the most important of which was the point discussed, but not decided, in *Woodford Land and Building Co.* v. *Woodford Urban Council* (1)—namely, whether the order, having been regularly made as regards procedure, must not be deemed duly made, and therefore conclusive evidence that the requirements of the Acts had been complied with having regard to the provisions of s. 1, sub-s. 1, of the Act of 1919.

The result was that the motion failed.

The plaintiff appealed.

Cunliffe K.C. and *John Bennett* for the appellant.

Grant K.C. and *Abbott* for the respondents.

[The arguments sufficiently appear from the judgment of the Vice-Chancellor, and, inasmuch as the Court of Appeal declined, at this stage of the proceedings, to decide any point other than the proper construction to be put upon Sch. I., Part II., clause 2 (*b*), of the Small Holdings Act, 1908, as amended by s. 1, Sch. I., Part II., of the Land Settlement (Facilities) Act, 1919, it is not necessary further to report those arguments.]

(1) (1921) 19 L. G. R. 559.

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LORD STERNDALE M.R. The question in this case arises out of the compulsory hiring of some land belonging to the plaintiff by the defendant corporation, and I think there is little doubt, from what has appeared in the argument, that the real objection is that the plaintiff thinks this land ought not to have been taken at all, and that there was other land equally available, or, if I may use such an expression, more available for the purpose than the land which has been taken, some perhaps the defendant corporation's own land, and some perhaps neighbouring land. That is not a matter which we can consider in any way. Parliament has made the local authority, subject, up to 1919, to the control of the Board of Agriculture, and since 1919, without such control, the persons who have to decide whether any particular piece of land ought or ought not to be taken. In coming to that conclusion they ought of course to consider all available land in the neighbourhood, and see whether it is right to take the piece of land in question, but, when they have decided, we have no jurisdiction to say they were wrong, and, since the confirmation of the Board of Agriculture has ceased to be necessary, nobody has, so far as I can see, any control over them so long as they act bona fide, and it is not suggested that they did not do so in this case. Therefore all we have to decide is a matter of law, and not of discretion, as to whether the land ought to have been taken or not.

The matter comes before us on an appeal from the learned Vice-Chancellor upon a motion for an interim injunction. On general principles, as there are important questions to be discussed at the trial, I certainly am of opinion that the matter should be kept in statu quo until the trial. The respondents here do not in any way object to that, and I daresay the learned Vice-Chancellor would have been of the same opinion if the matter had been put before him on that ground, but it was not: it was put before him on another ground, because I suppose it was hoped that the whole matter might be disposed of without any trial at all. However it was not agreed that the motion should be treated as the trial of the action, nor has it been agreed before us on this appeal that

it should be so treated. All that was agreed was that our judgment upon the point made in support of the motion by the plaintiff should be treated as final. The learned Vice-Chancellor would no doubt have followed our decision on this point when the case went back to him; so that really that agreement does not come to anything at all, and, as I have already said, my experience leads me to think that unless a matter is disposed of upon a motion and disposed of finally, to split it up and decide one point here and another point at the trial, generally leads to inconvenience and trouble, and, very often, to additional expense, because when the case is not finally disposed of on the motion it is very often found when the parties go down to trial that the facts upon one point influence the facts upon another so much that it is impossible to decide them separately.

There is however one point in this case which we can decide I think quite clearly, and as the parties wish us to decide that point we intend to do so, but with regard to the rest we do not intend to decide anything. The one point we do intend to decide is this: What is the construction of Part II. of the First Schedule to the Small Holdings and Allotments Act, 1908, read with the Land Settlement (Facilities) Act, 1919, Sch. I., Part II., clause 2 (*b*)? The compulsory purchase or hiring is carried out by an order made by the local authority, an order which they can now make without submitting it for the confirmation of the Board of Agriculture, but the Board still has considerable powers in respect of that order, and those powers are contained in the schedule to which I have referred. The first clause of the second Part of the First Schedule provides: "The Board shall make regulations for the purpose of carrying the order into effect and of protecting the council and the persons interested in the land, and the order shall incorporate such regulations." That is a matter that does not apply here. Then (2.) I read clause 2 (*b*) as it stood in the Act of 1908 and before the Act of 1919 was passed.

"(2.) The order authorising the land to be hired compulsorily shall determine the terms and conditions of the

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hiring other than the rent." The rent has to be settled by arbitration unless the parties agree, and then,

"(*b*) shall not authorise the breaking-up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings cannot otherwise be successfully cultivated."

Standing as it does there, and relating simply to small holdings, I do not think there is any great difficulty in working it. I do not say so from any knowledge of agriculture of my own, because I have not any, but it does not seem that there is any great difficulty, because it may very well be that the working of small holdings, in order to give to the small holdings some arable and some pasture, may involve the breaking up of pasture upon the land which is taken by the order, and the whole of this sub-clause (*b*) of clause 2 seems to me to be contemplating what is to be done upon the land which is taken and comprised in the order. I do not think there would be any great difficulty in working the clause with regard to small holdings. But then, by the Act of 1919, I think probably without considering what the result would be, the Legislature has said that "small holdings" shall be read as if it were "small holdings and allotments"; that is to say, that allotments shall be included, and for the purpose of the case before us the clause must now be read: "shall not authorise the breaking up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land or that the circumstances are such that allotments cannot otherwise be successfully cultivated." I think it is clear that the provision is very much more difficult to work as applied to "allotments" than it is with reference to "small holdings," because if pasture land is going to be used for allotments it has to be broken up in order to use it for that purpose, and I think the learned Vice-Chancellor stated pretty clearly the two constructions which he was invited by the one side and the other to put upon this clause. He says: "I come now to the second objection which is based on the view that some such words as 'in the neighbourhood' must be

read into the paragraph after the words 'small holdings or allotments as the case may be' with the result that the sub-paragraph prevents the land from being hired compulsorily for allotments if such allotments necessarily involve the breaking up of pasture unless the Board is satisfied that there is no land other than pasture in the neighbourhood." I think that fairly states the point which is taken. On the other side it is said, that just as where the clause referred simply to small holdings you must look at the piece of land that is being taken, so you must in the case of allotments. It may reduce the thing to an absurdity, and very likely it does, but the other construction, that it must mean unless there is no other land in the neighbourhood which can be successfully cultivated as allotments, is in my opinion an impossible construction of the clause. It is only necessary to read "shall unless the Board are satisfied that the circumstances are such that small holdings cannot otherwise be successfully cultivated" to see that that cannot possibly mean "unless the Board are satisfied that there is no other land than pasture in the neighbourhood which they can take." These are provisions which are dealing with the powers that are to be put into the order which deals with the land which is taken under the order. They are not dealing with the considerations that must be entertained before it is decided to take the particular piece of land; they are dealing, as I say, with the provisions to be inserted in the order under which the land is taken, and, applying that to the interpretation, I cannot resist the conclusion that, however ridiculous it may be, it does mean that if pasture land is taken for allotments the circumstances must be such that allotments cannot be successfully cultivated on that piece of land without breaking it up. I do not believe that the draftsman who put "allotments" into this sub-section ever contemplated what the result would be. The result is not at all satisfactory, but I cannot come to any other conclusion construing this sub-clause with the word "allotments" in it. It is an impossible construction that the Board are to enter into a local investigation of the question whether some other land is to be found available for allotments in order to

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consider what is the proper clause to put into the order under which the very land is being taken. If the construction suggested by the appellant is impossible we must accept that of the respondents, although it may be absurd. I think the construction which the Vice-Chancellor put upon the clause is right, and on that point alone I give my decision. As to other points which have been argued I say nothing at all about them.

WARRINGTON L.J. The only question with which I propose to deal is that with which the Master of the Rolls has just dealt—namely, the construction of sub-para. (*b*) of clause 2 of the Second Part of the Schedule to the Small Holdings and Allotments Act, 1908. Before I deal with that I must say a word or two about the course of the legislation on the subject. It begins with the Small Holdings and Allotments Act of 1908, and by that Act the council of a borough, where they propose to acquire land compulsorily for the purpose of small holdings and allotments, are authorized to submit to the Board of Agriculture an order for the compulsory hiring of land specified in the order for a period of not less than fourteen years, nor more than thirty-five years, and the provisions of Part I. of the First Schedule to this Act shall apply to the order in like manner as they apply to an order for compulsory purchase with the substitution of "hiring" for "purchase," and with the modifications set out in Part II. The provisions therefore of Part II. of the Schedule are applicable solely to cases of hiring land. Under the Act of 1908 the Board of Agriculture had complete control over the proceedings in this respect of the local authority. No order made by the local authority was to be valid or available unless and until it was confirmed by the Board. I will go back to the Schedule directly, but, before I do that, I will mention the effect of the Land Settlement (Facilities) Act, 1919. By s. 1 of that Act it was provided that "any order for the compulsory acquisition of land"—that included both purchase and hiring—"which is duly made after the date of the passing of this Act and before the expiration of

three years from that date by a council under the Small Holdings and Allotments Act, 1908 (hereinunder referred to as the principal Act), need not, except as otherwise expressly provided by this Act, be submitted to or confirmed by the Board of Agriculture and Fisheries, but shall have effect as if it had been so confirmed." The only effect of that is to remove the control which the Board of Agriculture had over the councils in the matter of making the order. The councils can now make the order for the acquisition of land, and it is not subject to the confirmation of the Board, but as to the provisions that are contained in the order they remain as they were before, only that they are to be stated by the local council without reference to the Board of Agriculture. Then, most unfortunately as I think, s. 25 of this Act of 1919 was inserted, and that provides: "The provisions of the principal Act," that is the Act of 1908, "specified in the first column of the Second Schedule to this Act shall be amended in the manner specified in the second column of that Schedule." The Second Schedule is entitled "Minor amendments of the principal Act," and the last of those minor amendments is this: "Schedule I., Part II., para. 2 (*b*); after the word 'holdings' there shall be added the words 'or allotments as the case may be.'"

I now go back to consider the Schedule to the Act of 1908, Part II., para. 2 (*b*), and it will be convenient I think to look at it first as it was prior to the amendment —brought in in that casual way by the Act of 1919. Part II. deals with the acquisition of land by compulsory hiring only. It provides this in clause 2: "The order authorising the land to be hired compulsorily shall determine the terms and conditions of the hiring other than the rent."

Pausing there for one moment the hiring is the hiring by the council, not the hiring by the individual holders of each small holding. It is the hiring by the council of an area of land which is to be devoted to the purpose of small holdings or allotments. Then (*a*): "shall provide for the insertion in the lease of covenants by the Council to cultivate

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the land in a proper manner and to pay to the landlord at the determination of the tenancy on the Council quitting the land compensation for any depreciation of the land by reason of any failure by the Council, or any person deriving title under them, or such persons as aforesaid deriving title under them to observe such covenants, or by reason of any user of the land by the Council or such persons as aforesaid, and (unless otherwise agreed) to keep the buildings and premises demised in repair." That, then, clearly refers to the terms which are to be inserted in the lease of the land, which will be obtained when the order has taken effect. Then comes (*b*): "shall not authorise the breaking up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land, or that the circumstances are such that small holdings cannot otherwise be successfully cultivated."

That again is a provision which has to be one of the terms of the hiring of the land by the council. Then (*c*): "shall not, except with the consent of the landlord, confer on the Council any right to fell or cut timber or trees or any right to take, sell or carry away," and so forth—again a term of the hiring of the land which it is proposed to hire.

We will now consider what was the proper construction of this clause 2 (*b*) prior to its amendment. I think there can be no doubt of what its construction was before the amendment. It was to be a term of the hiring of a piece of land to be appropriated to small holdings that the order shall not authorize the breaking up of pasture unless the Board are satisfied that it can be so broken up without depreciating the value of the land; that is the land hired by the council. That is what is meant by "the land" all through—"or that the circumstances are such that small holdings cannot otherwise be successfully cultivated." It says nothing about the possibility or impossibility of acquiring other land for the purpose of small holdings. It means, I think, quite obviously, that the Board are to be satisfied, and the only thing on which they are to be

satisfied is that small holdings, for which purpose the land is to be acquired, cannot there be successfully cultivated unless pasture is broken up, and there is no absurdity or unreasonableness in that. It is quite a familiar term of the hiring of farms, and other agricultural holdings in the country, that ancient pasture shall not be broken up except under certain conditions, and Parliament has said that, in hiring land by the council for the purpose of small holdings, the order acquiring these small holdings shall provide that pasture shall not be broken up except under certain conditions, the condition in this case being: "unless the Board are satisfied that small holdings cannot otherwise be successfully cultivated." So far I think no serious difficulty would have arisen while the provision was confined to small holdings. Then, the Act of 1919 has inserted the word "allotments." It may make it more difficult and it may produce something of an absurdity—the application of this provision to land which has been acquired for allotments—that may be, but one must be careful not to allow that to affect the construction of the provision unless there is an alternative construction. A possible alternative construction is suggested, which I think I can put very shortly. I think it is this: that the circumstances are such that small holdings cannot otherwise be successfully cultivated in the neighbourhood, that is to say there is no land in the neighbourhood which could be successfully cultivated as allotments except the particular land in question. That seems to me a perfectly impossible construction of this provision. All that the Board and the council are concerned with, in the matter dealt with here, is the hiring of an area of land for the purpose of devoting it to allotments, and when the provisions of the Schedule say the order shall determine the terms and conditions of the hiring—that is the hiring of that area of land—it seems to me that when it afterwards goes on to refer to the circumstances being such that small holdings or allotments, as the case may be, cannot otherwise be successfully cultivated it means successfully cultivated on that land. Of course it does to some extent

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produce an absurdity when the whole area of land is, as here, pasture and nothing else, because then there is only one circumstance which the Board can consider—namely, that it is pasture, and allotments cannot be successfully cultivated on a piece of pasture except by breaking it up—and it becomes in such a case as that the one circumstance which must determine the satisfaction of the Board. In my judgment the construction put upon Sch. I., Part II., clause 2 (*b*), by the learned Vice-Chancellor, is correct.

I just say one word of caution. It has been assumed here that the words "successfully cultivated" mean successfully broken up and cultivated, to use a general expression, for arable purposes. I am not quite sure that that is the sole construction, because when you come again to consider this Part II. of the Schedule it deals both with the acquisition of land for small holdings, and the acquisition of land for allotments. "Cultivate" is used in sub-para. (*a*) in reference to the whole area of the land, which may well comprise both arable and pasture. I am reminded that cultivation is thus defined in s. 61: "The expressions 'agriculture' and 'cultivation' shall include horticulture and the use of land for any purpose of husbandry, inclusive of the keeping or breeding of live stock, poultry, or bees, and the growth of fruit, vegetables, and the like." So that I think what I was going to say is quite correct. The use of pasture for husbandry is included in "cultivation" and the covenant by the council to cultivate the land in a proper manner, would be to cultivate the land and to use it for the purpose of husbandry in a proper manner; and when therefore you find in clause 2 (*b*) the words "successfully cultivated" it may well be, unless the circumstances are such that small holdings cannot be successfully cultivated, that is to say that they cannot be otherwise successfully used for the purposes of husbandry. Before my attention was called to the definition of "cultivation" I was going to say this: I am not quite sure that in the more popular sense pasture land may not be said to be capable of cultivation. Pasture land, though not of

course broken up, may be cultivated in the sense that its power of production may be improved by judicious husbandry, as for example by manuring, harrowing or top dressing. There are many ways in which it may be improved for the purpose of production, and in that sense cultivated and used for the purposes of husbandry. Therefore I am not quite certain that the absurdity which has been alluded to really arises, even where the whole area of land is pasture and nothing else.

The conclusion I arrive at is, as the Master of the Rolls has said, that the learned Vice-Chancellor's construction on the particular point I have dealt with is correct; but with regard to the other points it is not desirable now to express any final opinion which may cause confusion and trouble at the trial, but simply to grant an interlocutory injunction to keep things in statu quo.

YOUNGER L.J. I am of the same opinion. This Act of 1908 regulates the provision both of small holdings and allotments. Some of its provisions relate to small holdings only; others of them relate to allotments only. A third set of provisions relates both to small holdings and to allotments. Among that last set is s. 39, which deals with the compulsory acquisition of land either by purchase or by hiring. The land so compulsorily purchased or hired may be utilised either for allotments or for small holdings. Some of the provisions with reference to this compulsory acquisition of land are to be found in the First Schedule to the Act, and Part II. of that Schedule relates to the compulsory hiring of land. As a whole Part II. relates to the compulsory hiring of land, whether for small holdings or for allotments; it is not confined to one or the other speaking generally. But that is not or was not true of every clause in it. Sect. 2 (*b*), with which we are immediately concerned, is or was a case in point.

That sub-section prior to the Act of 1919 read as follows: The order authorizing the land to be hired compulsorily "shall not authorise the breaking up of pasture unless the

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Board are satisfied that it can be so broken up without depreciating the value of the land." That was one alternative. The second was: "or that the circumstances are such that small holdings cannot otherwise be successfully cultivated." Therefore as the clause stood prior to the Act of 1919 the first alternative, like the Schedule generally, related both to small holdings and to allotments; but the second alternative related to small holdings only. And the effect, prior to the Act of 1919, in relation to the compulsory hiring of land for allotments, was that it was not permissible for the local authority to break up pasture land compulsorily hired for that purpose unless the Board was affirmatively satisfied that it could be so broken up without depreciating the value of the land. The second alternative did not apply to allotments at all. Accordingly, so far as allotments were concerned, the owner of pasture land had this protection that inasmuch as it might not, if taken, be broken up, unless the Board was satisfied that this could be done without depreciating the value of the land, pasture land in that condition was not likely to be taken at all for allotments; for and if taken it could not be broken up, if thereby its value was depreciated. The Act of 1919, however, introduced into the second branch of clause 2 (*b*) the words "or allotments as the case may be," with the result that the clause thereupon became in both limbs of it, applicable to allotments as well as to small holdings. The result was also that as the alternatives are clear alternatives it became in relation to allotments enough to justify the breaking up of pasture land taken for that purpose that the Board should be satisfied that the circumstances were such that the allotments could not otherwise be successfully cultivated. If the Board were so satisfied it could not refuse to authorize the breaking up of the pasture land even in a case in which it was quite plain that the breaking up of that pasture land would depreciate, and even seriously, the value of the land. Whether those who introduced this amendment into the clause realized that this was the consequence of the change I do not know. It may be doubted. The amended clause does not read as if it were thereby intended to deprive

of all protection in this respect the owner of pasture land taken for allotments. Yet its effect is practically to leave him unprotected in this matter. For while there may be very many cases of small holdings capable of quite successful cultivation as such without breaking up pasture, in the case of allotments, which begin by being pasture land, it is not I suppose too much to say that probably in ninety-nine instances out of one hundred, those cannot as such be cultivated, practically speaking, at all unless that pasture land is broken up. As a result of the amendment accordingly the protection now given to an owner of pasture taken for allotments is practically illusory, and it would in my judgment have been preferable, as it would certainly have been clearer if, instead of adding these new words to that already somewhat cumbrous clause, Parliament had, without equivocation, stated that pasture land taken for allotments might be broken up without anybody's approval at all. If Parliament had done so, the result would not, I think, in ninety-nine cases out of one hundred have been different from that which is the position to-day. Nevertheless, I do not think we can strain the meaning of the words employed in order to give to them on the point now being dealt with by this Court an effect different from that which is plainly conveyed by them. In this connection, in my opinion, the words are so far clear. All that the Board has to consider when it is determining whether or no the breaking up of pasture taken for allotments shall be authorized on the ground that the allotments cannot otherwise be successfully cultivated is, the situation of the land taken and of no other land, neighbouring or otherwise. That only is the question which we are now deciding. We are not deciding the question whether in this case, and by virtue of this order, the Board has expressed any satisfaction at all within the meaning of the clause; nor are we deciding whether, if it has expressed satisfaction, it did so in time; nor are we expressing any opinion on the question whether, if it has not expressed satisfaction, it can now ever do so. These are questions which have to be determined at the trial. What we do decide is that the

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Board has proceeded upon the proper principle when in considering whether this pasture land may be broken up it has confined its attention to the situation of the land itself and of that land alone.

Solicitors for appellant: *Lycett, Jepson, Birley & Co., Manchester.*

Solicitor for respondents: *L. C. Evans, Town Clerk, Salford.*

G. A. S.

EVE J. 1922 Jan. 26, 27.

In re FOSTER'S SETTLED ESTATES.

[1921. F. 2246.]

Tenant for Life and Remainderman—Settled Estate—Abortive Sale of Mansion House by Tenant for Life—Forfeited Deposit—Capital Money—Improvements by Life Tenant—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 31, 53, 57—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 10, *sub-s.* 2; *s.* 13 (*ii*).

A forfeited deposit upon an abortive sale of a mansion house and grounds by the tenant for life of a settled estate constitutes capital money within s. 21 of the Settled Land Act, 1882, and is applicable as such and not to any other purposes.

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By an indenture of settlement, dated July 2, 1909, made by Edmund Benson Foster (the settlor) the then owner of the Clewer Manor estate (such settlement being made on the marriage of the settlor's eldest son, the respondent Edward Bayntun Grove Foster with Marjorie Wentworth Forbes) the said estate was settled to the use of the settlor for life, then to trustees for a term of 500 years to secure certain annuities, then to the use of the respondent, E. B. G. Foster, for life without impeachment of waste, with remainder to the use of his first and every other son successively in tail male, with remainder to the use of the first and every other daughter of the tenant for life successively in tail male, with divers remainders over. By clause 6 of the settlement the trustees thereof were declared to be trustees for the purposes of the Settled Land Acts, 1882 to 1890, and by clause 9 it was declared

that in addition to the other powers every tenant for life in possession in respect of life property thereby settled might, without the consent of the trustees or an order of the Court, sell the mansion house, pleasure grounds and park, and the land occupied therewith.

The estate consisted of a mansion house, park, garden and grounds known as Clewer Manor, comprising about 57½ acres, and various farms, lands and cottages, containing in all 206 acres, all situate near Windsor, in the county of Berks. The settlor occupied the mansion house and grounds until his death on November 1, 1917, when his eldest son became tenant for life in possession. Down to March, 1918, the testator's widow lived there. By an order dated March 1, 1918, on the application of the life tenant, an expenditure of not exceeding 600*l.* was authorized out of capital moneys in payment for additions and alterations of the mansion house in order to enable the same to be let, and 553*l.* was expended for this purpose. The mansion house and grounds were let furnished from April to October, 1918, but had since remained unoccupied. On April 2, 1919, the mansion house, park, garden and grounds were put up by the life tenant for sale by public auction under printed particulars and conditions of sale, but no sale was effected. On April 9, 1920, the life tenant entered into a contract with Oswold Harry Snazelle for the sale to him of the said property for 10,000*l.*, subject to the payment of a deposit of 1000*l.* This was paid to Waring and Gillow, Ld., the auctioneers, as stakeholders; and June 24, 1920, was fixed as the date for completion.

The purchaser made default in completing the sale, and by a letter, dated July 30, 1920, the solicitors of the life tenant gave notice to the purchaser that the purchase must be completed by September 1, 1920, or the contract would be treated as abandoned and the deposit forfeited. The purchaser took no further steps to complete and the deposit was treated as forfeited. On August 31, 1920, the purchaser brought an action against the life tenant claiming rescission of the contract and repayment of the deposit. Ultimately an

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order was made on February 18, 1921, dismissing the action, the purchaser undertaking to pay 5*l.* towards the life tenant's costs of action. The auctioneer's commission and charges in connection with this abortive sale amounted to 229*l.* 5*s.*, which, being deducted from the deposit, left a balance of 770*l.* 15*s.*, which had been paid to the solicitors for the life tenant and the trustees pending the decision as to who was entitled thereto. In order to enable the property to be sold the tenant for life had expended 499*l.* 7*s.* in the installation of electric light at the mansion house, and other moneys had been expended on baths and electric light fittings, making a total of 668*l.* 11*s.* 6*d.* By his affidavit he contended that this expenditure increased the sale value of the property to that extent, and but for that expenditure the abortive sale would never have been made, nor the forfeited deposit received. On November 2, 1921, an originating summons was taken out by the present trustees of the settlement, to which the tenant for life in possession of the settled estate and his four infant daughters, contingently entitled thereunder, were made respondents, asking whether the forfeited deposit belonged to the tenant for life absolutely, subject to the payment of the costs and expenses of the abortive sale, or whether it was applicable as capital moneys of the settlement under the Settled Land Acts. The further question was also asked (inter alia) whether the respondent's solicitor and clients costs of the action, *Snazelle* v. *Foster*, were also payable out of the forfeited deposit.

Wilfrid Hunt, for the trustees of the settlement.

H. C. Bischoff, for the tenant for life. I contend first that the tenant for life was selling the mansion house under the express power contained in the settlement. Sect. 10 of the Settled Land Act, 1890, prohibits the sale of the mansion house by a tenant for life except with the consent of the trustees or an order of the Court. Sect. 53 of the Settled Land Act, 1882, does not apply in this case. There is no case precisely in point, but I submit that this deposit is a casual profit belonging to the tenant for life: *In re Hunloke's*

Settled Estates. (1) That was the case of a sum paid to a tenant for life in consideration of his accepting the surrender of a lease, and that was held to belong to him as casual profit. In that case the tenant for life was not acting under the powers conferred by the Settled Land Acts. *In re Rodes* (2) was a case arising under s. 13, sub-s. 1, of the Settled Land Act, 1882, and *In re Hunloke's Settled Estates* (1) was distinguished. The case is different under s. 31. The question of damages for dilapidations to a mansion house recovered by a tenant for life against a lessee was considered in *In re Lacon's Settlement* (3), and the tenant for life was held entitled to keep them, as they were not capital moneys payable to the trustees. But, secondly, assuming that the contract for sale was entered into in the present case under the provisions of the Settled Land Acts, the forfeited deposit is not made capital money under the Acts, but belongs to the tenant for life as a windfall. In Hood and Challis' Conveyancing Settled Land and Trustee Acts, 7th ed., p. 284, a case of *Shrewsbury* v. *Shrewsbury* (4) is referred to in support of the statement that "it seems that a forfeited deposit is capital money." But that case is distinguishable from the present. *In re Ward's Settled Estate* (5) before Peterson J. was not the ordinary case of forfeiture of a deposit, as the judge himself expressly stated, and he held that in the circumstances of that case, where the deposit was to be retained by the vendor as the consideration for the release of the purchaser from the contract, it was capital money arising under the Act. Here it is the ordinary case of forfeiture as appears from the pleadings in the action. The action was dismissed and the only compromise was as to costs.

[EVE J. You received the money as agent for the trustees of the settlement.]

I submit not, it would only have been so received if the contract had, in fact, gone through, and it did not; it was only contingently a part of the purchase money for the house. But if both these arguments fail I submit that

(1) [1902] 1 Ch. 941.
(2) [1909] 1 Ch. 815.
(3) [1911] 2 Ch. 17.
(4) (1854) 18 Jur. 397.
(5) [1919] W. N. 51.

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the tenant for life is entitled to have recouped to him the sums contributed by him towards the necessary alterations and improvements to enable the house to be let or sold. These sums have increased the saleable value of the house, although by the Act such expenditure may not be authorized under the Settled Land Act. It comes within the principle of *Vyse* v. *Foster*. (1)

It would be unfair to allow this windfall to go in its entirety into the capital account. At any rate it should be kept in medio until it could be ascertained that the expenditure by the tenant for life had added to the price obtained for the house, when he might claim to be compensated in respect of such added value. In *Jesse* v. *Lloyd* (2) a trustee was recouped in respect of an outlay which he had made but which was irregular.

L. W. Byrne for the infant remaindermen. This sale was made under the powers of the Settled Land Acts. But if made under the special power in the settlement, s. 57 of the Settled Land Act, 1882, applies. On the last point argued for the tenant for life, he has no right in equity to be recouped out of capital money for the money he has expended in improvements upon the mansion house. That point has been established in the two cases of *In re de Teissier's Settled Estates* (3) and *In re Willis*. (4)

[He was stopped by the Court.]

EVE J. Mr. Bischoff has said everything that can be said on behalf of the tenant for life in support of his claim to be entitled to the balance of the forfeited deposit remaining after discharging the costs of the abortive sale and the taxed costs of the action to which he was exposed at the suit of the purchaser, but I am constrained to hold that the money is capital money arising under the Act and falls within s. 21 thereof. The first question is whether the contract of sale was entered into under the power conferred upon the tenant for life by the Settled Land Acts, or under the additional power contained in the settlement.

(1) (1872) L. R. 8 Ch. 309.
(2) (1883) 48 L. T. 656.
(3) [1893] 1 Ch. 153.
(4) [1902] 1 Ch. 15.

I have the contract before me and in clause 12 it is stated that the vendor is selling as tenant for life under the powers of the Settled Land Acts, 1882-1890. In face of this it is impossible to say that he was not selling under his statutory powers. It results from this, that in relation to this contract he must be deemed to be in the position, and to have the duties and liabilities of a trustee for all parties entitled under the settlement (see s. 53 of the Act of 1882), and when once this is appreciated it seems to me impossible to hold that he can retain for his own exclusive benefit any money coming by him under the contract. On this ground I think the forfeited deposit must be treated as capital moneys and not as a windfall or casual profit belonging to the life tenant. The same result would I think have followed had the sale been made under the special power. Mr. Bischoff argued that even so there are circumstances in this case which would justify the application of the money in recouping to the life tenant sums expended by him on improvements to the mansion house which have increased its saleable value, and that the moneys ought not to be regarded as capital moneys applicable only to the purposes authorized by s. 21 of the Act of 1882. It appears that the tenant for life has at his own expense effected improvements to the mansion house not authorized by the Act, and it is argued that in dealing with this unexpected addition to the capital of the settled estate it would be a fair and reasonable course to hold it in medio and if it should ultimately turn out that the expenditure of the life tenant has added to the price obtained for the mansion an opportunity should be afforded the life tenant of claiming recoupment from this fund to the extent of the added value. I cannot adopt that view—it would be affording the life tenant an opportunity of raising a case for applying capital moneys to unauthorized purposes and would open the door to those possible abuses which were pointed out by Chitty J. in *In re de Teissier's Settled Estates* (1) and repeated by Vaughan Williams L.J. in *In re Willis.* (2) I must therefore treat the balance of the deposit as capital moneys

(1) [1893] 1 Ch. 165. (2) [1902] 1 Ch. 15, 21.

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arising under the Act, and applicable as such and not to any other purposes. It is not disputed that the balance must be arrived at after payment of the costs, charges and expenses incurred by the tenant for life in and about the abortive sale. He has also been involved in costs occasioned by the unjustifiable action brought by the purchaser. That action the tenant for life was bound to defend, because the purchaser was asking for repayment of the whole deposit. The tenant for life is therefore entitled to be indemnified against the taxed costs of that action so far as they were not paid by the purchaser. The declaration will therefore be that the balance of the 1000*l.*, after indemnifying the tenant for life against all costs, charges and expenses properly incurred in connection with the abortive sale and the taxed costs of the action so far as the same have not been paid by the purchaser and providing for the costs of all parties to the present application to be taxed as between solicitor and client, ought to be held by the trustees as capital moneys arising under the Settled Land Acts.

Solicitors for all parties : *Ford & Leach.*

G. M.

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Jan. 17, 18; *Feb.* 1.

In re HALLENSTEIN.

HALSTED *v.* BLANK.

[1921. H. 2983.]

Will—War Legislation—Bequest of Life Interest to Alien Enemy—"Until she shall . . . . do or suffer any . . . . act or thing whereby the same . . . . might . . . . become payable or forfeited to or vested in any other person"—Forfeiture—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *ss.* 2, 3, 4—*Treaty of Peace Order*, 1919, *cl.* 1 (*xvi.*)——*Charge.*

By s. 2, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, "any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the Custodian to hold subject to the provisions of this Act and any Order in Council made thereunder . . . .":—

Held, that this sub-section related only to moneys payable under contractual obligations arising out of loans, partnership or membership of a company, and not to trust income payable by trustees to an enemy even when the income was derived from dividends on shares.

By his will a testator, who died in 1904, bequeathed his estate upon trusts whereby the residue and the proceeds of sale thereof were to go in equal shares to his children; and he directed his trustees to retain the share of each of his daughters upon trust during the life of the daughter to pay the annual income to her for her separate use without power of anticipation and until she should do or suffer any act or thing whereby the same, if payable to her absolutely or any part thereof, might have become payable or forfeited to or vested in any other person. In the event of a forfeiture under this provision the income was given upon a discretionary trust during the remainder of the life of the daughter, and subject thereto the daughter's share was to be held in trust for her children and issue as therein mentioned.

One of the testator's daughters had intermarried with a German in 1908, and had since resided in Germany. Since the coming into force of the Trading with the Enemy Amendment Act, 1914, the trustees had accumulated the income of her share, which amounted on January 10, 1920, the date of the ratification of the Treaty of Peace with Germany, to about 4000*l.*:—

Held, that the daughter's life interest was not determined on the coming into force of the Trading with the Enemy Amendment Act, 1914, but that it ceased on January 10, 1920, by reason of the Treaty of Peace charge, and that the accumulations of income up to that date were subject to the charge.

ADJOURNED SUMMONS.

The following statement of facts is substantially taken from the judgment of Sargant J.

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By his will dated December 14, 1903, the testator Michaelis Hallenstein bequeathed his estate upon trusts whereby the residue thereof and of the proceeds of sale and conversion thereof was to be held in equal shares for his children as therein mentioned; and he directed his trustees to retain the share of each of his daughters and the investments representing the same upon trust during the life of the daughter to pay the annual income thereof to her for her separate use without power of anticipation during coverture and until she should assign or charge the same or any part thereof or attempt so to do or become bankrupt or do or suffer any other act or thing whereby the same if payable to her absolutely or any part thereof might or would become payable or forfeited to or vested in any other person, and if the daughter should assign or charge the said income or any part thereof or become bankrupt or do or suffer any such act or thing as aforesaid the testator empowered his trustees in their absolute discretion to apply the said income or any part thereof for the support or benefit of such daughter and her issue or any other issue or any such persons in such manner as his trustees should think fit, and directed his trustees to pay the surplus of such income as if the daughter were dead; and the testator, after giving his daughter power to appoint a determinable life or less interest in her share to any husband after her death, directed that subject to the trusts and power aforesaid his daughter's share should be held in trust for her children and issue as she should appoint and subject thereto in trust for her children who should being male attain the age of twenty-one years or being female attain that age or marry.

The testator died on October 16, 1904, and his will was proved in the principal probate registry on November 15, 1904. His widow, to whom an annuity had been left by the will, died on October 18, 1906. One of his daughters, the defendant Florence Rebecca Blank, intermarried with Dagobert Blank, a German subject, on February 26, 1908, and ever since then has lived continuously in Germany. She has had two children, the

infant defendants, Sophie Charlotte Blank and Elena Blank.

On November 27, 1914, the date of the coming into force of the Trading with the Enemy Amendment Act, 1914, the share of the defendant Florence Rebecca Blank consisted and it still substantially consists of the following particulars: (*a*) the entirety of certain shares in limited companies which had been exclusively allocated to such defendant's share, (*b*) an undivided third of certain stocks, securities and cash which had been allocated to the shares of the said defendant and of the two other daughters of the testator, and (*c*) an undivided eleventh share of other stocks, shares and securities and cash representing the unappropriated residue of the testator's estate. Under the provisions of the Trading with the Enemy Acts the trustees of the will duly notified to the defendant, the Public Trustee, as custodian under the Trading with the Enemy Acts the particulars required by the said Acts to be notified to him as custodian in relation to the share of the defendant, Florence Rebecca Blank; and ever since the commencement of the war the plaintiffs as trustees of the will have accumulated the whole of the income of the said defendant's share, except only such parts thereof amounting altogether to the sum of 450*l.* as the plaintiffs were permitted by the Board of Trade to remit to her in Germany. The income so accumulated amounted on January 10, 1920 (the material date under the Treaty of Peace Order, 1919) to the sum of 3959*l.* 6*s.*

In these circumstances the trustees of the testator's will took out this summons to have it determined (inter alia): Whether by reason of the passing of the Trading with the Enemy Amendment Act, 1914, or the Treaty of Peace Act, 1919, and Treaty of Peace Order, 1919, or otherwise, the trust for the payment of the annual income of Mrs. Blank's share in the testator's residuary estate to her had ceased and determined and the discretionary trust come into operation, and if so from what date.

The custodian admitted that the trust had been determined on January 10, 1920, by virtue of the Treaty of Peace charge,

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but denied that it had determined at an earlier date by reason of the passing of the Trading with the Enemy Amendment Act, 1914.

R. H. Hodge for the summons.

Rolt K.C. and *Riviere* for Mrs. Blank and her children. When the Trading with the Enemy Amendment Act, 1914, came into force, the income of the daughter's share became immediately payable to the custodian under s. 2, sub-s. 1, of the Act (1) at any rate as regards the part of that income derived from shares in English companies exclusively allocated to this daughter's share, for this part of the income was a sum payable "to or for the benefit of an enemy, by way of dividends" within the meaning of the sub-section. This construction of sub-s. 1 is supported by the language of sub-s. 2. Sub-s. 2 deals with payments of a similar nature made to an enemy before the Act came into force and refers to "any such sum . . . . paid to any other person in trust for an enemy," an expression exactly covering payments to a trustee in trust for an enemy beneficiary. This point is a novel one, for the construction of s. 2 was not considered in any of the three recent cases relating to forfeiture of terminable

(1) Trading with the Enemy Amendment Act, 1914, s. 2: "(1.) Any sum which, had a state of war not existed, would have been payable and paid to or for the benefit of an enemy, by way of dividends, interest or share of profits, shall be paid by the person, firm or company by whom it would have been payable to the Custodian to hold subject to the provisions of this Act and any Order in Council made thereunder. . . . ."

"(2.) Where before the passing of this Act any such sum has been paid into any account with a bank, or has been paid to any other person in trust for an enemy, the person, firm or company by whom the payment was made shall, within fourteen days after the passing of this Act, by notice in writing, require the bank or person to pay the sum over to the Custodian to hold as aforesaid. . . . ."

Sect. 3: "(1.) Any person who holds or manages for or on behalf of an enemy any property, real or personal, ... shall, within one month after the passing of this Act, ... by notice in writing communicate the fact to the Custodian, and shall furnish the Custodian with such particulars in relation thereto as the Custodian may require. . . . ."

Sect. 4: "(1.) The High Court or a judge thereof may, on the application of any person who appears to the Court to be a creditor of an enemy, ... or on the application of the Custodian, ... by order vest in the Custodian any such real or personal property as aforesaid. . . . ."

enemy interests: *In re Levinstein* (1); *In re Chamberlain's Settlement* (2); *In re Biedermann.* (3) Sub-s. 3 of s. 2 provides penalties for failure to comply with the section but not a means of enforcing the obligation it imposes: see *In re Aramayo Francke Mines Ld.* (4) Here the trustees were mistaken in treating s. 3 as applicable. Sect. 2, sub-s. 1, applied and the result is that the daughter's protected life interest was determined on November 27, 1914, when the Act of 1914 came into force and the income became applicable under the discretionary trust in the testator's will. The daughter then suffered something whereby the income if payable absolutely to her would have become payable to another person: compare *In re Sartoris's Estate* (5); *In re Laye.* (6) If the trustees cannot be regarded as paying the trust income to the beneficiary "by way of dividends" within s. 2, sub-s. 1, of the Act, then it was so payable to her by the companies themselves and it was their duty to pay the dividends to the custodian.

G. T. Simonds for the Public Trustee. The income of Mrs. Blank was properly retained by the trustees and accumulated. It was not payable to the custodian under s. 2 of the Trading with the Enemy Amendment Act, 1914. That Act did not deprive her of the income and but for the Treaty of Peace charge the accumulated income would have been payable to her at the end of the war. Sect. 2, sub-s. 1, of the Act must be construed narrowly, because s. 2, sub-s. 3, renders a person failing to comply with the provisions of sub-ss. 1 and 2 liable to a fine or imprisonment. On its true construction s. 2, sub-s. 1, imposes an obligation to pay to the custodian any sum which would have been payable to or for the benefit of an enemy "by way of dividends, interest or share of profits." These words extend only to cases when the respective relations of company and shareholder, mortgagor and mortgagee, or partnership exist. Trust income payable by a trustee to his cestui que trust is not payable

(1) [1921] 2 Ch. 251.
(2) [1921] 2 Ch. 533.
(3) Ante, p. 31.
(4) [1921] 1 Ch. 675, 691.
(5) [1892] 1 Ch. 11, 22.
(6) [1913] 1 Ch. 298.

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by way of dividends. Sub-s. 2 of s. 2 really assists this view. It is a fantastic suggestion that a company paying dividends to the registered shareholder and having no knowledge that he holds the shares as trustee for an enemy should have the duty cast on them under severe penalties of requiring the registered shareholder to pay the dividends to the custodian. Sub-s. 2 is directed to the case of a bank or agent of an alien enemy.

Further, s. 2 must be read in conjunction with ss. 3 and 4. Sect. 3 provides a safeguard when trust property is held in trust for an enemy. The trustee is prevented by the common law from paying the capital or income to the enemy and s. 3 imposes the further duty on him of notifying the custodian. Then if the custodian is not satisfied that the trustee will comply strictly with his common law duty, he can apply under s. 4 for an order vesting the trust property in him.

If s. 2 applied in the case of a life interest a vesting order under s. 4 in such a case would obviously be superfluous. Such an order was made in chambers by Younger J. in *In re Von Wentzel's Settlement.* (1) It is admitted that the construction of s. 2 was not dealt with in *In re Levinstein* (2); *In re Chamberlain's Settlement* (3); or *In re Biedermann.* (4)

Rolt K.C. in reply. There is no reason to give a narrow construction to an Act passed in order to prevent money going to the enemy. When a trustee receives a dividend and remits it to the beneficiary, it is paid to him by way of dividend and this is even clearer when the dividend is paid direct to the beneficiary by the company by direction of the trustee. The section contemplates payment by way of dividend by a "person." *In re Von Wentzel's Settlement* (1) was dealt with in chambers and cannot be regarded as authoritative.

Cur. adv. vult.

Feb. 1. SARGANT J. delivered a written judgment in which, after stating the facts, he continued: By s. 1, sub-s. xvi.,

(1) Unreported [1915 V. 376].
(2) [1921] 2 Ch. 251.
(3) [1921] 2 Ch. 533.
(4) Ante, p. 31.

of the Treaty of Peace Order, 1919, which by s. 1, sub-s. 2, of the Treaty of Peace Act, 1919, for carrying into effect the Treaty of Peace, has statutory effect, it is provided that "all property, rights and interests within His Majesty's Dominions . . . . belonging to German nationals at the date when the Treaty comes into force . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged (*a*) . . . . with payment of the amounts due in respect of claims by British nationals with regard to their property rights and interests, ... in German territory, or debts owing to them by German nationals." By the same Order provision is made for giving effect to this charge and certain new duties are imposed upon the Public Trustee as custodian who has accordingly been made a defendant to this summons.

In these circumstances the trustees of the testator's will have taken out the present summons for the purpose of determining, in effect, whether the discretionary trust with regard to Mrs. Blank's income came into operation either on November 27, 1914, the date of operation of the Trading with the Enemy Amendment Act, 1914, or on January 10, 1920, the date of operation of the Treaty of Peace with Germany. The Public Trustee as custodian is interested in contending that the discretionary trust has not come into force at all or has done so at the later of these two dates. Mrs. Blank and her children have a common interest in arguing that the discretionary trust has taken effect and that this occurred on the earlier of the two dates. When however the summons came to be argued Mr. Simonds for the Public Trustee admitted, particularly in view of *In re Schiff* (1), that the charge under the Treaty of Peace Order was sufficient in itself to bring the discretionary trust into operation at latest on January 10, 1920. And accordingly I have only had to consider whether a cesser or forfeiture of Mrs. Blank's life interest had previously been caused by the Trading with the Enemy Amendment Act, 1914.

On this question the argument for Mrs. Blank and her

(1) [1921] 1 Ch. 149.

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children rested on s. 2 of the Act in question and particularly on the language of the earlier parts of sub-ss. 1 and 2 thereof. For this purpose Mr. Rolt properly chose that part of Mrs. Blank's income which was derived from shares exclusively allocated to her in English companies (since a forfeiture of any part of the trust income involved a forfeiture of the whole) and argued that that portion of the income which was derived from those shares was payable to her by her trustees by way of "dividends" within the meaning of the section. And he relied on the use in sub-s. 2, which deals with past payments, of the words "paid to any other person *in trust* for an enemy," as showing that the payments in both sub-sections included payments made or to be made by trustees to cestui que trusts. And in the alternative it was contended on the same side, mainly by Mr. Riviere, that even if the amounts representing the dividends on these shares were not payable by the trustees to Mrs. Blank by way of dividend, they were at any rate payable to her by the companies themselves "by way of dividends." On the other hand Mr. Simonds argued that the language not only of sub-ss. 1 and 2 of s. 2, but of sub-ss. 3, 4 and 5 thereof clearly indicated that the section was dealing with moneys payable under contractual relationships such as loans, partnership or membership of a company, which were of an ordinary commercial or business nature, and were quite different from the relationship of trustee and cestui que trust. And he also laid great stress on the fact that the interests of enemy beneficiaries under trusts were dealt with separately by ss. 3 and 4 of the Act; and produced more than one vesting order made under the Act which contained an express direction that the trustees should be at liberty to pay the trust income to the custodian—a direction that would have been wholly superfluous had such income already been payable by virtue of s. 2 of the Act. The form of these orders is of some weight as showing the prima facie view of the Judge specifically charged with the administration of the Act; but it must not be pressed too far having regard to the fact that the point does not seem to have been argued. Indeed I am told that the present case is the first in which

there has been a definite contest as to the meaning in this respect of s. 2 of the Act.

I have therefore to apply my mind to the construction of this section as being res integra. Having done so I am convinced that Mr. Simond's interpretation is the correct one. In my view there is a clear and marked distinction drawn by the Act between the subject matter of loan, partnership and membership of a company dealt with by s. 2, and the subject matter of trust interests dealt with by ss. 3 and 4. And further the phrase "payable by way of dividends," which is that relied on by Mr. Rolt, seems to me singularly inappropriate to denote such a trust relationship or obligation as that by virtue of which the trustees were bound to pay to Mrs. Blank the net income of her trust fund, as derived from a number of sources including the dividends on these shares, and as diminished by any expenses properly chargeable against the income of the trust. The dividends on the shares were, it is true, payable to the trustees by way of dividend; but the net income of Mrs. Blank was in my judgment payable to her by way of fulfilment of the obligations imposed on the testator's trustees by the trusts of his will relating to her share.

Further the use of the word "trust" in sub-s. 2 of s. 2 does not in my judgment indicate that the payments referred to in sub-s. 1 include payments arising by virtue of an obligation imposed by way of trust. It merely puts other classes of agents for enemy payees upon the same footing as banks keeping accounts for them, and prescribes that the former class also should be bound to pay over to the custodian any payments of the specified description, that they may have received on account of or in trust for the enemy payees.

Nor do I assent to the alternative suggestion that there were any sums payable by the respective companies to Mrs. Blank by way of dividends. The trustees of the will cannot be eliminated in this way. It was to them and not to Mrs. Blank that the companies had to make payments by way of dividends. And it would in my judgment be immaterial for the present purpose, if (as was suggested might be the case)

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the trustees had given directions to the companies to pay the dividends direct to Mrs. Blank or to some bank or agent for her. Any payments so made would be made, not by way of dividends payable to Mrs. Blank, but by way of dividends payable to the trustees and diverted to Mrs. Blank as their nominee.

In my judgment therefore the discretionary trust did not come into operation till January 10, 1920, and any accumulations representing income down to that date are subject to the provisions of the Treaty of Peace Order, 1919, and must be dealt with as the Public Trustee, as custodian, shall direct.

Solicitors: *Gush, Phillips, Walters & Williams; Coward & Hawksley, Sons & Chance.*

H. C. G.

C. A. 1921 *Nov.* 8, 9, 10.

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[1921. A. 939.]

Will—Construction—Real and Personal Estate—Gift on Trust for such Son (living at his Death) of Testator's Son as first or alone attains Twenty-one—Contingent or vested Interest—Gift Over—Intermediate Rents and Profits—Persons having the Powers of a Tenant for Life—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 58, *sub-s.* 1 (*ii.*) (*vi.*) (*ix.*), 63.

Testator by his will, dated in 1917, devised and bequeathed certain lands and a house and its contents "upon trust in fee simple or absolutely for such son (living at my death) of my son W. A. as first or alone attains the age of 21 years, or, failing any such son, then upon trust as part of my residuary estate"; and he gave his residue in trust for both or either of his sons W. A. and J. J. A. who should survive him, and, if both, in equal shares. The will also provided that if and so long as some son (living at the testator's death) of his son W. A. should be living, but the property should not have become absolutely vested beneficially in any such son, the trustee should at the expense of the residuary estate maintain the house and keep up an establishment there, and allow the same to be used or enjoyed by any of the persons for the time being entitled in expectancy thereto. The testator died in 1919. His two sons survived him. W. A. had four sons living at the testator's death, the eldest of them being then thirteen years of age:—

Held, that the interests of the grandsons were contingent, and until one of them should have attained the age of twenty-one or all of them should have died without attaining that age, W. A. and J. J. A. were entitled to the intermediate rents and profits of the property.

Held, further, that W. A. and J. J. A. were not persons having the powers of a tenant for life under s. 58, sub-s. 1 (ii.) (vi.) or (ix.), of the Settled Land Act, 1882.

Decision of Russell J. affirmed.

THE testator, William Waldorf, Viscount Astor, by his will dated January 3, 1917, after declaring that his said will was intended to dispose of all his property (except in the United States of America and Italy as thereinafter mentioned) appointed the plaintiff, the Hon. John Jacob Astor and the defendants Sir John Coode Adams and Gerard Thorp to be the executors thereof, and appointed the defendant, the Farmers' Loan and Trust Co. of New York to be the trustee thereof. By clause 12 of the will he devised and bequeathed to his trustee, first all the freehold lands situate at or near Brighton in the county of Sussex and known as Western House, Brighton, together with all buildings and erections standing thereon at his death together with the full benefit of any and every contract subsisting at his death for building or for the execution of any work of whatsoever description on the said lands or any part thereof and so that all moneys payable to him or his estate under any such contract should be paid out of his residuary estate in exoneration and for the benefit of the hereditaments by this clause devised, and the persons entitled to such hereditaments ; and secondly (subject to the foregoing bequests) he gave all his furniture, pictures, prints, statuary works of art, articles of virtu, gold and silver plate, plated articles, books, linen, glass, china, movable safes, and fittings, stable and garage furniture, plants and garden tools, and implements which should at his death be in or about or belonging to such lands and buildings or any of them, in trust in fee simple or absolutely for such son (living at his death) of his son Waldorf Astor as first or alone should attain the age of twenty-one years or failing any such son then upon trust as part of his residuary estate, "Provided always and I declare that if and so long as some

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son (living at my death) of my son Waldorf Astor shall be living but the property by this clause devised and bequeathed shall not have become absolutely vested beneficially in any such son the following provisions and powers shall have effect: (A) My trustee shall at the expense of my residuary estate maintain and preserve the said property (including any additions thereto made after my death) in first-rate condition and complete repair and (as to such parts of the said property as shall be in a finished state at my death) in substantially the same state as existing at my death. With power for my trustee for that purpose at the like expense to keep up any establishment and to employ any servants or other employees and to execute any works of drainage, planting laying out of grounds or gardens, repair, renewal or improvement and to effect any insurances and to make any outlay for the benefit or in respect of the said property or any part thereof and to take any steps for the maintenance preservation or custody thereof. (B) All outgoings of whatsoever description (including wages of servants or employees) in respect of the said property (including any such additions as aforesaid) or any part thereof shall be paid out of my residuary estate. (C) My trustee in the absolute discretion of my trustee may allow the said property (including as aforesaid) or any part thereof to be held used or enjoyed by and on behalf of the person or any of the persons for the time being entitled in expectancy thereto upon such terms or conditions as my trustee may think proper." By clause 14 he devised and bequeathed to his trustee "all the residue of the property whatsoever and wheresoever of which this my Will is intended to dispose (as in Clause 1 hereinbefore mentioned), including any such property over which at my death I may have any general power of appointment or disposition by Will upon trust to and so that my trustee shall sell call in and convert into money the same and that out of the moneys so produced my executors or my trustee shall pay my funeral expenses and debts and my English testamentary expenses (if and so far as not otherwise made payable by this my Will or any Codicil thereto or any

indenture or indentures hereinbefore referred to) and the pecuniary legacies bequeathed by this my Will or any Codicil hereto and all sums payments and expenses hereby or thereby made payable out of my residuary estate. And my trustee shall hold the residue of the said moneys in trust for both or either of my sons, Waldorf Astor and John Jacob Astor who shall survive me and if both in equal shares." By clause 17 the testator said: "I empower my trustee to postpone the sale, calling in, and conversion of all or any part or parts of my residuary real and personal estate respectively (including leaseholds and any property of a terminable wasting or hazardous nature) for so long as my trustee in the absolute discretion of my trustee shall think fit. And I direct that my trustee shall in no case sell or convert into money reversionary property before it falls into possession unless in the opinion of my trustee an earlier sale is beneficial. And I empower my trustee during any such interval or postponement as aforesaid to let upon lease for any term of years and for any purpose (including the working of unopened mines) and to accept surrenders of leases of and generally to manage according to the absolute discretion of my trustee and with all the powers in that behalf of an absolute owner my residuary real and leasehold property and to make out of the income or capital of my residuary estate any outlay which my trustee may consider proper for renewals of leases improvements rebuilding repairs insurance calls on shares or other investments or otherwise for the benefit or in respect of my residuary estate or any part thereof."

The testator died on October 18, 1919. His two sons, the residuary devisees and legatees, survived him. His son Waldorf Astor (now Lord Astor) had four sons living at the death of the testator, named William, Francis, Michael and John. Of these grandsons of the testator two were living at the date of the will—namely, William and Francis who were specific legatees thereunder. At the testator's death they were all infants, the eldest, William, being thirteen years of age.

On April 21, 1921, an originating summons was taken out

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by the plaintiffs, the Right Hon. Waldorf Viscount Astor, and the Hon. John Jacob Astor, asking (inter alia) for the following declarations—namely :—

1. That upon the true construction of the will, and in the events which had happened, the plaintiffs had, until one of the four grandsons of the testator should have attained the age of twenty-one years, the powers of a tenant for life, or tenants for life, of the above-mentioned hereditaments and the furniture and chattels respectively settled by the said will, and were entitled, until the attainment of the age of twenty-one years by one of the said grandsons, to the rents profits and income thereof.

2. Alternatively that the plaintiffs should be deemed to constitute together the tenant for life of the said hereditaments and furniture and chattels within the meaning of s. 63 of the Settled Land Act, 1882, and if necessary that the Court might give leave to the plaintiffs to exercise with reference to the said property all the powers conferred upon tenants for life by the said section.

The summons was heard by Russell J. In 1921 he delivered a considered judgment in which, after stating the facts, he said : A devise of real estate to a devisee when he shall attain a certain age, or if he shall attain a certain age, without any further context to assist, is contingent, and the attainment of the prescribed age is a condition precedent to the estate vesting in him : *In re Francis.* (1) A sufficient context may be found which enables the Court to declare the estate to be a vested estate defeasible on death under the prescribed age : as for instance there may be in terms a disposition of the intermediate income, or there may be a gift over in the event of the devisee failing to attain the necessary age, or some other sufficient context. In the case before me there is such a gift over, and other provisions exist in the will which would enable me to construe this devise as conferring a vested estate defeasible if there were any person in whom the estate could be said to be vested. If the gift had been for " the eldest son (living at my death)

(1) [1905] 2 Ch. 295.

of my son, Waldorf, when he attains 21, and if he dies under 21 then for the next eldest son (living at my death) of my son Waldorf " and so on with a gift over on the death of all such sons of Waldorf under twenty-one I should have had little difficulty in holding that the defendant William took a vested estate in fee simple, liable to be divested if he died under the age of twenty-one years. For this I should have relied on the decision in *Phipps* v. *Ackers*. (1)

The gift however is in very different terms: It is " For such son (living at my death) of my son Waldorf Astor as first or alone attains the age of 21 years." It is to such member of a class as first attains a specified age. In *Duffield* v. *Duffield* (2) a testator devised estates to trustees in trust as follows: [His Lordship stated the facts of that case and continued:] One question for decision was whether any son of the daughter by her said husband was entitled during minority to the rents and profits of the particular estates; in other words had any son a vested defeasible interest or was the interest of every son contingent upon his attaining the age of twenty-one years? The case was argued in the House of Lords, the judges being present. Certain questions were put to the judges. The Chief Justice of the Common Pleas read the answers containing the unanimous opinion of the judges with his own reasons for the conclusions to which they had come. These were accepted and acted upon by the House of Lords. According to the answers of the judges they were of opinion that no son of the testator's daughter by her present husband during the infancy of such son would be entitled to the rents and profits; in other words that no son took a vested interest. The Chief Justice in stating his reasons uses the following language; he says (3): " The estates in the Southwood Park and Haverhill Farm, given to the second son, and if there be only one son, to the eldest, and if there be no son, to a daughter, do not vest until a second or only son attained twenty-one, or in case of the failure of male issue, until a daughter attained 21,

(1) (1842) 9 Cl. & F. 583.

(2) (1829) 1 Dow & Cl. 268.

(3) 1 Dow & Cl. 310, 312, 314.

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or marries with the consent of the trustees appointed by the will. The testator's other freehold estates do not vest until some son of the testator's daughter shall attain the age of 21 years, and take the name of Elwes. Until these estates become vested, the estates, and the rents and profits derived from them, pass to the heir-at-law of the testator, as estates not disposed of by the will. Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates, or the rents and profits of such estates." And further he states: "The condition precedent to the vesting of these estates is so apparent, it is declared in such express terms by the will, that no ingenuity can explain it away no refinement can get rid of it; and by holding that these estates are vested, we must overthrow the case of *Stephens* v. *Stephens* (1) which is directly in point to the questions submitted to us and the authority of which was never questioned." Finally he says: "It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of 21 years; until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will, and therefore, there is no person in whom the estates can vest. It is an established principle of law, recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will."

Again in the oft discussed case of *Festing* v. *Allen* (2) the devise was as follows: "To the use of my dear wife and her assigns for and during the term of her natural life if she shall so long continue my widow and unmarried, without impeachment of waste; and from and after her decease or second marriage which shall first happen to the use of my said granddaughter Martha Hannah Johnson and her assigns

(1) (1736) Cas. temp. Talb. 228. (2) (1843) 12 M. & W. 279, 300.

for and during the term of her natural life and from and after her decease to the use of all and every the child or children of her the said Martha Hannah Johnson who shall attain the age of twenty-one years, if more than one equally to be divided amongst them share and share alike to hold as tenants in common and not as joint tenants and to their several and respective heirs and assigns for ever and if but one such child then to the use of such one child his or her heirs and assigns for ever," and then came a gift over for want of any such issue. In that case Martha survived the testator's widow and after the testator's death she married a Mr. Festing. She died in 1833 leaving three infant children, and the main question was whether those children took on her death any interest in the devised estate. The judgment proceeds in these terms : " We think that they did not. It was contended on their behalf that they took vested estates in fee immediately on the death of their mother, subject only to be divested in the event of their dying under twenty-one, and the case, it was said, must be treated as coming within the principle of the decision of the House of Lords in *Phipps* v. *Ackers* (1) and the cases there referred to. To this, however, we cannot accede. In all those cases there was an absolute gift to some ascertained person or persons, and the Courts held, that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously devised should be divested, and pass from the first devisee into some other channel. The clear distinction in the present case is, that here there is no gift to any one who does not answer the whole of the requisite description. The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing. Even if there were no authority establishing this to be a substantial and not an imaginary distinction,

(1) 9 Cl. & F. 583.

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still we should not feel inclined to extend the doctrine of *Doe* v. *Moore* (1) and *Phipps* v. *Ackers* (2) to cases not precisely similar. But, in fact, the distinction to which we have adverted in a great measure forms the ground of the decision in the case of *Duffield* v. *Duffield* (3) in the House of Lords and *Russel* v. *Buchanan* (4) in this Court, and on this short ground our opinion is founded. We think that Mrs. Festing was tenant for life, with contingent remainders in fee to such of her children as should attain twenty-one, and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily defeated." In the case of Lord Astor's will there is no gift to any one who does not answer the whole of the description : the devisee cannot be ascertained until one of the four grandsons of the testator attains the age of twenty-one years.

I am accordingly of opinion that the persons entitled to the intermediate rents and profits arising during the period commencing with the testator's death and ending with the day on which one of the grandsons attains twenty-one, or on which the last surviving grandson dies an infant (his three brothers having also died in infancy) are the residuary legatees. The next question is : Have the residuary legatees in the circumstances the powers of a tenant for life under the Settled Land Acts ? They are entitled to the rents and profits for an uncertain period. They may never become entitled to more. On the other hand, if and when all the grandsons die under age they will become entitled not to Western House, but to the proceeds of sale thereof. The only provision of the Settled Land Act under which any one suggested that the case could fall were s. 58, sub-s. 1 (ii.) and (vi.). The estate or interest which under this section carries with it the powers of a tenant for life must be in possession : that is in possession as distinguished from reversion or remainder. In so far as the residuary legatees are entitled at the present time to the rents and profits their interest is in possession, but they are not so entitled for their own lives, or for any other life, or for

(1) (1811) 14 East, 601.
(2) 9 Cl. & F. 583.
(3) 1 Dow & Cl. 268.
(4) (1834) 2 C. & M. 561.

years determinable on life. The case cannot, accordingly, fall within s. 58, sub-s. 1 (vi.). Nor are they, in my opinion, tenants in fee simple, whose estate or interest is in possession under s. 58, sub-s. 1 (ii.). Their only interest in the fee is in the proceeds of sale, if and when all the four grandsons die under twenty-one. Nor does s. 63 assist matters since the trust for sale there referred to must be an immediate trust for sale. The result is that, in my opinion, the residuary devisees and legatees have not the powers of a tenant for life under the Settled Land Act, 1882.

The testators grandsons appealed, and there was a cross-appeal by the residuary devisees and legatees.

Preston K.C. and *H. B. Vaisey* for the appellants. The result of the learned judge's order is that neither the house nor its contents can be let or disposed of in any way pending the attainment of the age of twenty-one by one of the infant appellants. All parties regard this result as very unsatisfactory and it is desired if possible to obtain a decision which will enable the property to be dealt with. It is accordingly submitted by the appellants that the eldest grandson, William, takes a vested interest in the house at Brighton and the contents thereof, liable to be divested, in the event of his death under twenty-one, in favour of the next eldest grandson and so on. It is conceded by the respondents that, if this contention be correct, the eldest living grandson would be a person having the powers of a tenant for life within the meaning of the Settled Land Acts, and such powers could be exercised on his behalf by the trustees for the purposes of the Acts. If however the Court should hold that the interests of the grandsons are contingent, the appellants desire to support so much of the order of the learned judge as declares that the plaintiffs as residuary legatees have not the powers of a tenant for life for the purposes of the Act. The question whether the interests of the grandsons are vested or contingent depends upon the true construction of the will and in particular upon clause 12. The testator's intention is clear. He desired that the house and its contents should be used and maintained as

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a residence for the benefit of his grandsons until one of them should attain twenty-one, or until they should all die under that age, and that the house and its contents should be kept up at the expense of his residuary estate. It is only on the happening of one of the two events that the residuary legatees take anything. The gift in clause 12 is not a gift to a class or to a person nominatim but is a gift to an ascertained person. At any given moment it is possible to say which grandson is entitled and this is sufficient to vest the gift. It must always be the eldest living grandson. If the gift had been to such grandson as first or alone shall marry it would not have been possible to predicate of any of them that he would be the first to marry and the gift would be a contingent gift.

The eldest living grandson is an ascertained person.

[WARRINGTON L.J. There is no gift to any one except the first grandson who shall attain twenty-one.]

The context of the will shows that it was the intention of the testator to treat the gift as vested and not contingent. The rule is conveniently stated in Hawkins on Wills, 1st ed., p. 237, 2nd ed., p. 283: "In the construction of devises of real estate 'it has long been an established rule for the guidance of the Courts . . . . that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will': (Per Best C.J., in *Duffield* v. *Duffield* (1)). To accomplish this, (1.) words of seeming condition are, if possible, held to have only the effect of postponing the right of possession: and (2.) If the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, so as to confer an immediately vested estate, subject to be divested on the happening of the contingency." The will contains the following indications of the testator's intention: (*a*) The use of the word "absolutely" which is equivalent to "indefeasibly"; (*b*) the directions as to the upkeep and

(1) 1 Dow & Cl. 268, 311.

maintenance of the house; and (*c*) the form of the gift over and the direction that the property is to fall into residue. *Phipps* v. *Ackers* (1) in which the gift is indistinguishable from the gift in the present case shows the weight to be attached by the Court to a gift over as controlling words which prima facie confer a contingent interest. *Duffield* v. *Duffield* (2) which was relied upon by Russell J. in the Court below has never been regarded as settling any principle at all. There is no real or substantial distinction between a gift to A if he shall attain twenty-one or a gift to the first son of A who attains twenty-one, and the use of the word "presumptively" in that case made it clear that the gift was intended to be contingent. *Festing* v. *Allen* (3) which was also relied upon by Russell J. has been expressly disapproved of by four judges who have refused to follow it. It was however followed in *Bull* v. *Pritchard.* (4) It is admitted that there cannot be a vesting in an unascertained person. The interest must vest in an ascertained person and that in this case is the eldest grandson for the time being. *Riley* v. *Garnett* (5) is cited in Hawkins on Wills, 2nd ed., p. 290, for the proposition that the context may qualify any words of contingency, and may show that under a devise to such children as shall attain twenty-one, the children were intended to take vested estates at birth, subject to be divested.

[YOUNGER L.J. In *Festing* v. *Allen* (3) all the children could have come in. Here only one can have the potentiality of taking. As soon as one takes the rest would be excluded.]

In *Pearks* v. *Moseley* (6) Lord Selborne referred to *Riley* v. *Garnett* (5) as correctly stating the law.

It is submitted that *Riley* v. *Garnett* (5) cannot stand together with *Festing* v. *Allen.* (3) *Browne* v. *Browne* (7) is also in direct conflict with *Festing* v. *Allen.* (3)

Clauson K.C. and *Dighton Pollock* for the respondents (appellants on the cross-appeal).

(1) 9 Cl. & F. 583.
(2) 1 Dow & Cl. 268.
(3) 12 M. & W. 279.
(4) (1846) 5 Hare, 567.
(5) (1849) 3 De G. & Sm. 629.
(6) (1880) 5 App. Cas. 714, 721.
(7) (1857) 3 Sm. & Giff. 568.

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[LORD STERNDALE M.R. We will not trouble you on this point. I think we should hear the cross-appeal before we give judgment.]

If the trustee lets the house the rent belongs to the residuary legatees until one of the grandsons attains twenty-one. If the trustee allows the grandchildren to occupy the house there will be no rents and profits arising from it. Throughout, the persons entitled to the rents and profits are the residuary legatees. Russell J. held that the residuary legatees had not the powers of a tenant for life within s. 58, sub-s. 1 (ii.), of the Settled Land Act, 1882, that is, that they did not come within the words " a tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event." It is submitted that the residuary legatees do come within these words. They are equitable tenants in fee simple subject to an executory limitation over on the first of the grandsons attaining twenty-one. Until that event takes place they are tenants in fee simple. They are entitled to the rents and profits indefinitely. The difficulty Russell J. felt about clause (ii.) was that the gift was not a direct residuary gift, but a gift upon trust for sale and that the residuary legatees only took the proceeds. It is submitted however that that difficulty is got over by the provision in clause (ix.) of the same sub-section : " A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest thereon on bankruptcy or other event." The residuary legatees are entitled to the income of the property until a grandson attains twenty-one, or all die under that age, or until a sale. They are entitled to the rents indefinitely subject to the trustee exercising his power of letting the grandchildren into possession or one of them attaining twenty-one. A devise of rents and profits indefinitely gives the devisee the fee simple : *Mannox* v. *Greener*. (1) The residuary legatees are therefore tenants in fee simple of the property.

(1) (1872) L. R. 14 Eq. 456.

If that be not so then it is submitted that the residuary legatees come within clause (vi.) of sub-s. 1 which deals with the case of a person whose interest is limited to the life of himself or of another: "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose.": see *Williams* v. *Jenkins*. (1) The residuary devisees are entitled, intermittently no doubt, to the rents and profits.

[WARRINGTON L.J. It is only at the discretion of the trustee that they get anything at all: *In re Atkinson*. (2)]

Again, *In re Jones* (3) shows that a person may technically be in receipt of rents although there are none in fact. Persons in that position were there held to come within clause (ix.) of s. 58, sub-s. 1. That applies here. The words of that clause are: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." The residuary legatees come within that clause.

[LORD STERNDALE M.R. Does forfeiture on an event include a temporary suspension, as, for example, if the trustee exercises his discretion by letting the grandsons into possession?]

The residuary legatees are all along entitled to the rents and profits subject to the power of the trustee to take them away for the benefit of the infant grandchildren.

[YOUNGER L.J. referred to *In re Llanover*. (4)]

That case was distinguished in *In re Sumner's Settled Estates*. (5)

The interest which the residuary legatees take puts them

(1) [1893] 1 Ch. 700.
(2) (1885) 30 Ch. D. 605; (1886) 31 Ch. D. 577.
(3) (1884) 26 Ch. D. 736.
(4) [1907] 1 Ch. 635.
(5) [1911] 1 Ch. 315.

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in the position of persons having the powers of a tenant for life under s. 58.

Whinney for the executors.

Harman for the trustee.

Cur. adv. vult.

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Russell J. has held that that is not so. In my opinion he was right. The material provision is as follows: "In trust . . . . for such son of my son Waldorf Astor as first or alone attains the age of 21 years" I do not think it is disputed that prima facie that would be a gift which would not take effect until a certain condition precedent had been fulfilled, but it is said that, although that may be so, there is a context here which shows that it was intended that the property should vest in the eldest son subject to be divested. I cannot see where that is to be found. The context most relied upon is that there is a gift over, "failing any such son then upon trust as part of my residuary estate." I have some doubt whether that is a gift over at all, whether it is not merely an alternative gift. But assuming it to be a gift over it seems to me it is not a gift over in the sense that it compels the clause to be read as though it were to my son William if he attain twenty-one years, and in default to the next son

whatever his name may be, and so on down to the fourth. It does not seem to me to be a gift over of a nature which obliges you to read the original gift in that way. Then it is said that the word "absolutely" in the proviso points in that direction. The argument seems to be that "absolutely" means "indefeasibly," and that it points to this: that there is a vesting which is not absolute or indefeasible, and that must be in the eldest son. I may say in passing I do not quite see why it should be in the eldest son any more than any of the others. I do not know that there is any presumption that the eldest son will attain twenty-one and the others will not or that he being the eldest son will attain twenty-one before the others have a chance of doing so, elder sons very often die before their younger brothers. But it seems to me that if there be any context here the important part of it points against any vesting of that kind—i.e., the context contained in clause (C) which gives the trustee power to allow the property to be held, used or enjoyed by or on behalf of any of the persons for the time being entitled in expectancy, and therefore contemplates that they may allow the enjoyment of the property to the second, third and fourth sons, or either of them, to the exclusion of the eldest, and in the same way to the eldest to the exclusion of any of the others. That provision seems to me to point against there being any vesting in the eldest son subject to divesting.

I do not think it necessary to go through the cases referred to. The rule which we have to apply is very clearly and well stated in Hawkins on Wills, 2nd Ed., p. 289, where, after speaking of the rule in *Edwards* v. *Hammond* (1), which I understand to be a rule that if possible you hold a condition to be subsequent rather than precedent, he says: "It has been much disputed whether the rule in *Edwards* v. *Hammond* (1) can be applied, where the attainment of the given age is made *part of the description* of the devisee: as if the devise be to all and every the children of A *who* shall attain 21, or to *such* children of A who shall attain 21, with a gift over in default of children attaining that age. Notwithstanding *Browne* v. *Browne* (2)

(1) (1683) 3 Lev. 132. (2) 3 Sm. & Giff. 568.

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the weight of authority appears against the extension of the rule to such cases." Then he gives the cases on which he relies for saying that the weight of authority is against the extension of the rule. I quite agree with that paragraph. It seems to me when you apply it in this case the will becomes quite clear, because I do not think anybody can read this will without seeing that the attainment of the given age is made part of the description of the devisee. The devise is in trust "for such son of my said son Waldorf Astor as first or alone attains the age of 21 years." The attaining of the age of twenty-one years seems to me to be clearly made part of the description of the person in whom this gift is to vest, if it ever does vest, in any of those four people; and it seems to me that this is really a stronger case than the instance which is given in the passage which I have read from Hawkins on Wills, because the instance given there is "all and every the children of A who shall attain 21, or to such children of A who shall attain 21"—namely, to a class. In that case it might have been argued that the whole of the class took a vested interest subject to be divested, but this is very much stronger because this is not a gift to a class, it is a gift to only one individual out of several who are mentioned, and that individual is to be the one who first or alone attains the age of twenty-one years. It seems to me clearly part of the description, and until there is a person who answers that description there can be no vesting of the property in question.

I think therefore that Russell J. was perfectly right on the first point, which is the point arising on the appeal.

The question in the cross-appeal is more difficult, but I have come to the conclusion that the learned Judge is right there also. It is whether the residuary legatees can be considered as persons occupying the position of tenants for life under the Settled Land Act, 1882. If they are, then they can exercise a power of sale, and can sell this house. The executors would be well pleased I think if they could, but of course they simply say that they will do what the Court thinks is the right thing, and they do not contest the matter in any way.

First, it is said that the residuary legatees come within s. 58, sub-s. 1 (ii.), as being tenants in fee simple, with an executory limitation, gift, or disposition over, on failure of issue, or in any other event. I cannot see how the residuary legatees, who take subject to the powers and obligations of the trustees to which I have already referred, can possibly be said to be tenants in fee simple. Then it is said, if that be not so, they come within sub-s. (vi.). Sub-ss. (ii.) and (vi.) are the only sections with which the learned Judge dealt. The argument before us has proceeded more upon sub-s. 1 (ix.) than upon (ii.) or (vi.), although (ii.) and (vi.) were also relied upon. Sub-s. 1 (vi.) is "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease on any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose."

The position of these residuary legatees seems to me to be this. Any right they have as residuary legatees is of course subject to the powers and obligations of the trustee under the will. I say that for this reason, they as residuary legatees can take nothing except what, if anything, is left after the obligations and the powers of the trustee have been exercised. That being so, I cannot see that they can be in any way said to be tenants for their own or any other life or for years determinable on life.

But it is said they come within sub-s. (ix.) which provides: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other events." The question has been raised whether the words "during his own or any other life" are to be read necessarily with a trust or direction so as to govern those words throughout the whole of the sub-section. I am inclined to think they ought to be considered as they

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have been considered, both by the late Master of the Rolls when sitting as judge of first instance, and by Eve J. in the two cases which have been cited to us; but in any event whether that be so or not, I do not think that the residuary legatees come within this sub-section at all. They are not persons entitled to the income of land under a trust or direction for payment thereof to them. As I have said, their position is this. The trustee has an obligation to keep up this house and to spend money upon it in order to keep up an establishment and to keep it in repair for the purpose of the subsequent power that is given to the trustee to allow any one of these persons entitled in expectancy to occupy the house at any time that they wish. If, after the discharge of that obligation and the exercise of that power, should the trustee see fit to exercise it, there is anything left in the way of rents and profits arising from this property, then the residuary legatees are entitled to it. But how do they get it? They get it as a part of the residue otherwise undisposed of, and not as income of the property at all.

Therefore in my opinion, whether you put it in the words "during his own or any other life" or not, there is no trust or direction for payment of the income of the land to these residuary legatees at all.

For that short reason I think the learned judge was right upon the second point also, and the cross-appeal should also be dismissed.

I have not considered whether the effect of my decision may be convenient or inconvenient, because I have nothing to do with that. I have only to consider whether these residuary legatees come within the actual sub-sections of the Settled Land Act, 1882, or not. In my opinion they do not, and therefore I think both appeal and cross-appeal should be dismissed.

WARRINGTON L.J. I am of the same opinion. We have two questions to determine. The first is on the construction of the will of the testator, the second on the construction and effect of certain sections of the Settled Land Act, 1882.

With regard to the construction of the will, the appellants contend that the eldest son of the present Lord Astor, an infant under the age of twenty-one years, is under the provisions of clause 12 of the testator's will, entitled to a vested estate in fee simple in the house at Brighton subject only to be divested in case he should die under the age of twenty-one years. If he should so die then the second surviving son would become entitled to a vested interest in this house liable to be divested in case he should die under the age of twenty-one years, and so on. The learned judge has decided, and the respondents of course support that decision, that no son of the present Lord Astor is at the present moment entitled to any estate or interest in the house at all, but that the interests of them all are contingent on their respectively attaining the age of twenty-one years, in this way: that the first son to attain the age of twenty-one years would then become entitled absolutely to the house, and until that happens none of them is entitled to any interest at all, the gifts being contingent.

I will state the devise quite shortly for the purpose of explaining what I am going to say as to the meaning of it. The clause in question is a devise and bequest to the trustee, a corporation, of a house at Brighton, and the furniture and effects therein. On the terms of the devise so far as the house is concerned I may say at once that that on construction would pass the legal estate in the house to the trustee. I start with that. Then the trustee is to hold the house and its contents "In trust in fee simple or absolutely"—it is fee simple as to the land and absolutely as to the chattels—"for such son (living at my death) of my son Waldorf Astor"—that is the present Lord Astor—"as first or alone attains the age of 21 years, or failing any such son then upon trust as part of my residuary estate Provided always and I declare that if and so long as some son (living at my death) of my son Waldorf Astor shall be living but the property by this clause devised and bequeathed shall not have become absolutely vested beneficially in any such son" then certain provisions and powers therein expressed are to come into operation.

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I think it is desirable to read the last of those clauses—namely, clause (C) which is: "My trustee in the absolute discretion of my trustee may allow the said property (including as aforesaid) or any part thereof to be held used or enjoyed by or on behalf of the person or any of the persons for the time being entitled in expectancy thereto upon such terms or conditions as my trustee think proper." I propose to deal with this question first independently of authority. I will deal with the house alone, for simplicity's sake. The testator has devised the house to a trustee in trust for such son of my son Waldorf Astor as first or alone attains the age of 21 years. There is no devise to any particular son. There is a devise to one of the sons, and to such one of the sons as shall fulfil a certain description. At the present moment no one of such sons fulfils that description. There are four sons: William, Francis, Michael, and John. All of them are infants. Any one of them may be the devisee. No one of them can now be said to be the devisee. The one (if any) who ultimately becomes devisee will do so because he fulfils a certain description which the testator has annexed to the devisee. He will be the son who first attains the age of twenty-one years. I should have thought that was perfectly plain.

Against that it is said that there is a context which compels one to give an unnatural construction to those words and to hold that which appears plainly to be a condition precedent, because it is part of the description of the devisee, is to be treated as a condition subsequent. And reliance is placed upon what is called a gift over contained in the words "or failing any such son then upon trust as part of my residuary estate." In my opinion so far from contradicting the construction which I should have adopted on the words themselves it seems to me to strengthen that view. It is not a gift over. It is an alternative gift. If there is no son who fulfils the description, then it is to go into my residuary estate. So far there is no context at all which would explain these words. Such context as there is in my judgment confirms the view that I have expressed, and for that purpose I rely particularly upon sub-clause (C)—namely, that the

trustee may allow the property to be held, used or enjoyed by or on behalf of the person or any of the persons entitled in expectancy. So long as those four sons are alive and under the age of twenty-one years, each one of them is entitled in expectancy.

Any one by the death of those who come above him in the list may attain the age of twenty-one and become entitled to the house. And the testator clearly recognizes that because he treats all the sons of Lord Astor as being persons entitled in expectancy. It is quite impossible as the appellants seek to do, to select the eldest son and say that he is the person in whom the estate is now vested. He is no more likely to succeed to this property than the boy who is now three years old. The accidents of life are equal to all, and the youngest son may be the one who becomes absolutely entitled just as much as the eldest.

So far as the words of the will are concerned therefore, independently of authority, I should be clearly of opinion that the learned judge was right, and that the interests of all these sons were contingent and not vested.

Now how do the authorities stand? The proper way of dealing with a question of this sort is to see if the authorities establish any rule of law (as distinct from a ruling depending on the construction of the particular will before the Court at the moment) which prevents one from giving the words the natural construction which they would otherwise have. So far as there is any authority on such a case it appears to me to support the view which I have just expressed.

There are certain cases of which *Phipps* v. *Ackers* (1) is an example, in which a gift to a named person if and when he attains the age of twenty-one years, with a gift over in the event of his dying under the age, is held to confer upon the original devisee a vested estate liable to be divested. The origin of that rule is not in doubt. It was derived from the anxiety of the Court to prevent the failure of a contingent devise taking effect in the future for default of an estate of freehold sufficient to support it. But however that may

(1) 9 Cl. & F. 583.

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be, that class of case is entirely different from the present. There the devisee is ascertained, there is a direct devise, and the words "if and when he attains the age of 21 years," with a gift over, might in their ordinary and natural construction be read as giving him the estate with a liability to go over if he fail to attain the age of twenty-one years.

Of the other class of authorities the leading case of *Duffield* v. *Duffield* (1) is the best example. I will refer to that case directly, because I think it is an exceedingly important one. That is a case of the same nature as the present, that is to say, the case of a gift to a person not definitely described by name or description, but to a person who may or may not fulfil a particular description, and a devise to him if he does fulfil that description, with an alternative devise, or even with a devise over, if there should be no such person. In those cases it has been held, and I think with consistency, with the exception of *Browne* v. *Browne* (2) and perhaps one ought to add *Riley* v. *Garnett* (3)—that in such a case as that the gift is contingent. And that is obviously common sense, if I may say so with respect. I now turn to *Duffield* v. *Duffield*. (1) That was a very peculiar case. It was very much debated in the House of Lords. The gift there was: "In case there should be but one son of my daughter who shall attain the age of 21 years, for such son his heirs and assigns for ever, and in case there shall be two or more sons who shall attain the age of 21 years then in trust for the second of such sons his heirs and assigns for ever." There were certain other gifts to the daughters which I need not read, because it will not usefully add anything to that which I am going to say. The question there arose whether there was a vested interest in any son of the testator's daughter. The matter, as I have said, was discussed at very great length, and, after considerable argument in the House of Lords, certain questions were put to the judges for their opinion. One question was: "According to the true construction of the testator's will would any son of the testator's daughter

(1) 1 Dow & Cl. 268. (2) 3 Sm. & Giff. 568.
(3) 3 De G. & Sm. 629.

be entitled to the rents and profits of the testator's estate called Southwood Park or the farm at Haverhill ? " That was the estate, the subject of the devise in question. The judges answered : " We think that no son of the testator's daughter during the infancy of such son would be entitled to the rents and profits of the estate called Southwood Park or the farm at Haverhill." The judges were unanimous. The reason for their opinion was given by Best C.J. who said that he alone was responsible for those reasons, but the opinion of the judges was unanimous. Now Best C.J., in giving the reasons, expressed himself in these terms (1): "It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of 21 years ; until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will, and therefore, there is no person in whom the estates can vest. It is an established principle of law, recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will." Then Lord Eldon in giving the judgment of the House of Lords, after mentioning that it was an appeal from a decree which came before the House immediately from the Vice-Chancellor's Court, and so forth, says : "I entertained an opinion that the decree was founded in error "—the decree having been contrary to the opinion of the judges given as I have mentioned —" but when I heard the case argued at the bar, and found that distinctions had been taken in cases subsequent to that of *Stephens* v. *Stephens* (2), it occurred to me that the best course ought to be taken in order to have that matter settled. I felt it very difficult to frame the questions to be put to the judges. They have given these questions their most attentive consideration, and their opinions have been most ably stated

(1) 1 Dow & Cl. 314, 318. (2) Cas. temp. Talb. 228.

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by the Chief Justice of the Common Pleas, and that leads to the reversal of much of the decree. I concur in all the answers which have been given by the learned judges, and hope, as Lord Talbot said of *Stephens* v. *Stephens* (1), that this will be a leading case."

So it must be taken that Lord Eldon not only accepted the opinion of the judges, but that having read or heard, as he unquestionably had, the reasons given by Best C.J. he concurred in this opinion. After that it seems to me the case for the appellants here is perfectly hopeless. As I have already said, upon the natural meaning of the words the attaining of the age of twenty-one is part of the description of the legatee, and unless and until one of the sons fulfils that description he cannot take; and that is supported by the decision of the House of Lords in *Duffield* v. *Duffield* (2), which Lord Eldon said was to be treated as a leading case. That seems to me to be the end of it.

I now turn to the other question, certainly a more difficult and to some extent a perplexing one.

The position is this: The house at Brighton with the furniture is given to the trustee upon the trusts which I have already explained. It was intended by the testator—I think we may gather that from sub-clause (C)—that if the trustee and the guardian of the boys thought fit, to use it as a home for these boys during their minority, or rather until some one of them should attain the age of twenty-one years and become absolutely entitled, the trustee was to keep the house in repair with power to keep up an establishment, pay servants, make any outlay for the benefit of the property or any part thereof, take any steps for the maintenance, preservation or custody thereof—the custody no doubt refers to the furniture—and all outgoings were to be paid out of the residuary estate, and then the trustee was to have a discretion to allow any of these four sons to hold and enjoy the property or any part thereof. But that was entirely in the discretion of the trustee. Then the testator gave the residue of his estate to the trustee upon the usual trusts for sale or

(1) Cas. temp. Talb. 228. (2) 1 Dow & Cl. 268.

conversion, the proceeds to be held in trust for his two sons the present Lord Astor and the younger son John Jacob Astor in equal shares absolutely. The shares are not settled, and there is no distinction between income and capital.

It is contended that those two sons have under the Settled Land Act the powers of a tenant for life, and of course reliance is placed on s. 58 and several sub-sections, those relied upon being sub-ss. (ii.), (vi.) and (ix.). I will read the section itself first. "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act." Sub-s. (ii.) is: "A tenant in fee simple, with an executory limitation, gift or disposition over, on failure of his issue, or in any other event." Sub-s. (vi.) is: "A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose." Sub-s. (ix.) is: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event." Now forfeiture is held to include determination. I think those last words are properly read "until determination of his interest therein on bankruptcy or other event." That is to say, not until the other event but until determination of his interest on the happening of another event. Now do the residuary legatees in this case come under any of these descriptions? In my opinion they do not. The real position is this. The trustee has certain duties to perform with reference to this house and other property. Included in those duties is that of exercising a discretion which may have to be exercised at any moment to allow one or more of those boys to hold and enjoy the

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premises. He has to be ready, if the occasion should arise in which it would be his duty, to allow these boys to take possession. It would be his duty to be in a position to put them in possession. He cannot deprive himself of his discretion. Now the result of that is that he could not let this house for any definite term. The utmost he could do would be to make a letting of it furnished for some short period on terms that the tenant should immediately quit if it should become necessary for the trustee to exercise his discretion under that clause (C). He may have to spend money. It is true that ordinary outgoings are to be paid out of the residuary estate, but I think some of the things which he would have to do may have to be paid for out of such casual rents and profits as there may be. Whether there will be any at all is a matter of doubt. The residuary estate, as I have said, is given to the sons absolutely. Now if there should be in the hands of the trustee any money arising from the use of this house which is not, and is not likely to be, wanted for any purpose amongst those to which the trustee may devote monies in his hands, under such circumstances that sum would be undisposed of by the testator's will, and it would pass to the residue as corpus. It would not be income at all. It would be part of the monies in the hands of the trustee of which there was no effective disposition, and as such would no doubt pass to the residuary legatees. But it does not pass to them as income of the land; it passes to them simply because there is this sum of money in the hands of the trustee left after the fulfilment of his trusts, which is not otherwise disposed of by the testator's will.

That seems to me to be the real position in which these residuary legatees are placed. If so they cannot fulfil any of the requirements mentioned in those sub-sections which I have read. But, even supposing this money were income of the land then I think they would fail also in bringing themselves within these descriptions. They certainly are not tenants in fee simple of land. At the present moment at the very outside they are persons who may in certain events be entitled to receive certain monies representing

rents and profits of the land, not for any definite period or anything of the sort, but certain casual monies that may arise.

As to sub-s. (vi.) they are certainly not "tenants for life or any other life, or for years determinable on life." They are in no sense tenants for life.

Then with regard to sub-s. 1 (ix.), which is the one more nearly applying to the case than any other, they are not entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life or until the sale of the land or until forfeiture of his interest on bankruptcy or other event. I may say that in my opinion no person can bring himself within sub-s. (ix.) on its true construction unless he can show that he is tenant for his own or some other life. That seems to me to be an essential part of the description. It has been sought to read it as if it would include a person not entitled to the income for his life, but entitled to the income for any period whatever determinable on the happening of any event. It seems to me that would be a perfectly absurd construction of the sub-section, because it would introduce that which cannot have been the intention of the framers of this statute—namely, to give a person entitled to the income of the land for, it may be, a few weeks, the power to exercise all the powers of a tenant for life. It is a phrase perfectly familiar to conveyancers, and it seems to me that those words are used in that sense—namely, a direction for payment to A B for his life or until something shall happen. Then if he lives long enough he gets it for his life : I mean if the event does not happen he gets it for his life, if the event happens while he is alive then his life estate ceases. That is what seems to me to be intended by this sub-section. It seems to me that these residuary legatees cannot in any sense be said to be entitled to the income for their own or any other lives. It is contended that they are entitled to the income of this land for the lives of the sons or until one of such sons attains twenty-one years. It seems to me for the reason I have stated—namely, that they are really not entitled to the

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income of the land at all, that they cannot come under that sub-section.

On the whole I think Russell J. was right on both points, and both the appeal and the cross-appeal fail.

YOUNGER L.J. Upon the first question raised on this appeal, I do not think it necessary to say anything more than to express my entire concurrence with the conclusions arrived at by my Lord and the Lord Justice. Upon the second question, that which is raised by the cross-appeal, I can express my views in very few words.

In my opinion, the interest in residue—and I use that word, following Mr. Clauson, as a convenient expression—if any there be in this house at Brighton pending the attainment of the age of twenty-one by any one of the four grandsons of the testator or the death of all these four grandsons under that age is neither the interest, whatever else it may be, of a tenant for life, nor of a person having the powers of a tenant for life, as defined by s. 58 of the Settled Land Act, 1882. No subsequent interest in the house, taken by residue, on the death of all of the grandsons under twenty-one is in my judgment for present purposes relevant for consideration at all for the reason amongst others that that interest is in its character and in its extent quite different from the interest, if any, during the earlier period. Moreover in my judgment that subsequent interest in no real sense commences before the contingent estate of the four grandsons determines. The introductory words it will be remembered of s. 58 of the Settled Land Act are that the interest subsequently described as creating or constituting a person having the powers of a tenant for life must be an interest in possession, and in my judgment in no true sense of the word can it be said that at this moment the ultimate interest taken by residue in this house in the event of each of these four grandsons dying under twenty-one is an interest in possession at all.

Now what is the interest which during the period of suspension is taken by residue in this house? It appears to me that it is no more than the expectation—probably the

very remote expectation—that there may be some profits in respect of this house during this period of suspension, received by the trustee, and not required by the trustee either for the execution of the trust in relation to the house or the exercise by the trustee of its power, in relation to it during the same period of suspension. In my judgment such an interest, so shadowy and so remote, is in no way brought, and can in no way come, within s. 58 of the Settled Land Act, 1882, in any of its sub-sections. I entirely concur in what has been said by the other members of the Court in reference to that point.

I will only add one word on the general case. It is said that the result at which the learned Judge and this Court have arrived is in the present case inconvenient in its consequences. That may in one sense be so. But it seems to me that it will not be beyond the ingenuity of those concerned, with the assistance of the Court in dealing with infants' interests in property, to overcome at least in part some of the inconveniences which have been alluded to. On the other hand the consequences of accepting the view which has been put forward by the appellants on their cross-appeal with reference to the operation of the Settled Land Act in relation to this particular devise would appear to me to be quite extraordinary. If they be well founded they would enable the testator's devise in this case which was not immediate, only because each of the grandchildren for whom he was providing this house was still under the age of twenty-one, to be entirely defeated in its purpose, that purpose plainly being that the first of these grandsons attaining twenty-one should on the attainment of that age have this house equipped, furnished and repaired ready as a residence for him either to live in or to dispose of as he thought fit and pending the attainment of twenty-one by him, and also during the period when his other brothers were alive to have that house available for them as a residence during his minority. Now I cannot imagine any more reasonable or rational disposition of a dwelling house intended for the benefit of a grandson than that, and it would I think require very clear statutory provisions to lead the

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Court to come to the conclusion that there was anything in that rational disposition which the testator was not entitled to expect that the Court would give effect to according to its tenour. No such statutory provision interfering with the operation of that devise in the way in which it is expressed by the testator has been shown, and in my judgment it would be far more inconvenient in the general case that the view of the appellants on the cross-appeal should prevail than that it should be, as I think it ought to be, rejected.

Accordingly in my judgment the appeal and the cross-appeal should both of them be dismissed.

Appeal and cross-appeal dismissed.

Solicitors : *Waterhouse & Co. ; Janson, Cobb, Pearson & Co. ; Adams & Adams.*

G. A. S.

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In re CHILD VILLIERS' APPLICATION.

VILLIERS *v.* ATTORNEY-GENERAL.

[Title No. 249,278.]

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Charity—Donation of Land—Proceeds applicable for general Purposes of Charity—Registration under Land Transfer Acts—Restriction—"Mixed charity"—Time for ascertaining Nature of Charity—Charitable Trusts Act, 1853 (16 *&* 17 *Vict. c.* 137), *s.* 62—*Charitable Trusts Amendment Act,* 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

In order that a donation or bequest may come within the provision in s. 62 of the Charitable Trusts Act, 1853, exempting from the jurisdiction or control of the Charity Commissioners a donation or bequest made to a "mixed charity"—i.e., a charity maintained partly by voluntary subscriptions and partly by income from endowment—it must be a donation or bequest to a charity which is already, at the date of gift, a mixed charity. It is not sufficient to bring the donation or bequest within the exemption for the charity to become a mixed charity between the date of gift and the determination by the Court of the question of exemption.

Land within the registered area was conveyed to a charity which at the time, although possessed of other income-bearing land, was not also maintained by any voluntary subscriptions. After the application for registration and pending the determination of the question of

exemption by the Court, voluntary subscriptions were received and the charity became a mixed charity:—

Held, by the Court of Appeal, reversing the decision of Peterson J., that the land not having been given to a charity which at the date of gift was a mixed charity, was not exempt from the jurisdiction or control of the Charity Commissioners, and that a restriction must be entered on the register against a disposition of the land without their consent.

ADJOURNED SUMMONS.

By an indenture (hereinafter called "the Trust Deed") dated February 22, 1921, and made between the applicant the Hon. Arthur George Child Villiers of the first part the applicant Gerald Valerian Wellesley of the second part and the same two applicants (therein and hereinafter referred to as "the trustees") of the third part, after a recital that the applicant Villiers was desirous of establishing a trust for charitable purposes and contemplated that he and other persons might from time to time make voluntary subscriptions or donations of lands and hereditaments, whether of freehold, leasehold or other tenure, and stocks, moneys and securities to or for the benefit of such charitable purposes in aid of or in addition to such voluntary subscriptions to be held by the trustees upon the trusts thereinafter contained, it was witnessed and declared as follows:—

1. "The trustees shall stand seised of any hereditaments which may at any time or times hereafter be conveyed to the trustees to be held upon the trusts of these presents (all of which are hereinafter referred to as 'the said hereditaments') upon trust either to retain the same or in the discretion of the trustees to sell call in and convert the same into money and to invest the proceeds of such sale calling in and conversion in any of the investments hereinafter authorised for the investment of the General Fund hereinafter referred to with full power to vary and transpose such investments at their discretion and shall stand possessed of such investments and the income thereof upon the trusts hereinafter declared of and concerning the General Fund."

2. "Until sale or conversion of the said hereditaments . . . . the trustees shall hold the same upon trust either to use or permit the same to be used or to pay or apply the net

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income thereof for or in connection with or for any purpose incidental or ancillary to such charitable purposes as they shall from time to time in their absolute and uncontrolled discretion think fit."

4. "The trustees shall stand possessed of all donations legacies subscriptions and other moneys which may hereafter be paid to them to hold as trustees of these presents (all of which said donations legacies subscriptions and moneys and the investments representing the same are hereinafter referred to as 'the General Fund') upon trust either to retain the same or any part thereof in the state of investment or condition in which the same shall be at the date of the same becoming subject to the trusts of these presents or shall as and when they shall think fit from time to time sell or otherwise dispose of the same and convert the same into money with power to reinvest the proceeds thereof in any of the forms or modes of investment hereinafter authorised and shall stand possessed of the general fund upon and with and subject to the trusts powers and provisions hereinafter declared and contained of and concerning the same."

5. "The trustees shall pay the capital and income of the general fund to or apply the same for such charitable purposes as the trustees shall from time to time in their absolute and uncontrolled discretion think fit."

At the date of the trust deed the charity was not possessed of any property whatever; but on March 8, 1921, certain property at Leyton was purchased by the applicant Villiers and was conveyed to the trustees of the trust deed to hold upon the trusts thereof.

On March 17, 1921, further property, comprising three houses at Hoxton, was purchased by the applicant Villiers and was conveyed to the trustees to hold upon the trusts of the trust deed. This latter property was situate within the area for compulsory registration under the Land Transfer Acts, 1875 and 1897, and on April 14, 1921, the applicants applied for registration as proprietors thereof with absolute title. Notice of the application was served on the Attorney-General, who required a restriction to be entered on the register

that no disposition should be registered without the consent of the Charity Commissioners. The applicants objected to the entry of the restriction and the matter was referred to the Acting Chief Registrar on August 11, 1921, who decided that the application for registration must be refused unless the consent of the Charity Commissioners was obtained before October 15, and that if such consent were obtained, the restriction in question must be entered.

The matter was then referred to Peterson J. in chambers and by him adjourned into Court for argument upon the question whether upon the true construction of s. 62 of the Charitable Trusts Act, 1853, the land at Hoxton was exempt from the jurisdiction of the Charity Commissioners.

In addition to the two pieces of land conveyed to the trustees as above mentioned, certain sums of money had also been received by them at the times and on the dates following :—

Before the date of the application for registration—namely, on March 18, 1921—the applicant Villiers had made a donation of 37*l.* 4*s.* 11*d.* After the date of the application—namely, on April 20—a sum of 39*l.* 4*s.* 3*d.* royalty on gravel taken from the Leyton property, was credited to the account of the trust, and on May 2 the applicant Villiers made a further donation of 200*l.*; and on July 27 three donations of 5*l.* each were made by other donors, two of whom wrote on September 17 to the charity saying that they would make the sum given by them an annual subscription. On October 5 subscriptions of one, two and ten guineas were also received, and the donors of the two last-mentioned sums subsequently wrote to the charity saying that they would make the sums so given an annual subscription. The summons came on for hearing before the judge in Court on October 28 and November 1 and 8, 1921.

C. A. Bennett for the applicants.
Dighton Pollock for the Attorney-General.

PETERSON J. stated the material provisions of the trust deed and the facts as above set out and continued : On

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those facts what is the effect of s. 62 of the Charitable Trusts Act, 1853 ?

The question arises in this way : By s. 29 of the Charitable Trusts Amendment Act of 1855 it was provided that : "It shall not be lawful for the trustees or persons acting in the administration of any charity to make or grant, otherwise than with the approval of the Board, any sale, mortgage, or charge of the Charity estate " ; and s. 48 provided that : "In the construction of the principal Act "—that is the Act of 1853—" and this Act the word 'charity' shall include every institution in England or Wales endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853." The section which deals with the special exemptions from the Act of 1853 is s. 62 of the Act of 1853. That section, after enacting that the Act should not extend to various institutions, which it specified, provided that the Act should not extend or be applied to " any institution, establishment, or society for religious or other charitable purposes, wholly maintained by voluntary contributions." Having regard to what was said in *In re Clergy Orphan Corporation* (1) I cannot hold that at the time when the gift by Mr. Villiers of the piece of land in question was made the charity was wholly maintained by voluntary contributions within the meaning of s. 62, for it seems that one at least of the two pieces of land conveyed by Mr. Villiers produced an income. In that case Davey L.J., dealing with these words, says : " The first exemption is of charities 'wholly maintained by voluntary contributions.' It is not contended that the corporation is within this description. But we may observe that if these words are read in their widest and most liberal meaning every charity in the kingdom would be exempt, for we suppose that the ultimate source of all charitable endowments is to be found in the spontaneous bounty of founders and supporters. The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is

(1) [1894] 3 Ch. 145, 150.

dependent on the gifts of the benevolent, whether recurrent or occasional, and whether inter vivos or by will." Returning to the section, I find this further provision: "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof." Under the definition in s. 66: "'Endowment' means and includes all lands and real estate whatsoever, of any tenure, and any charge thereon or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity." The meaning of that part of s. 62 to which I have just referred is that where any charity is maintained partly by voluntary subscriptions and partly by income arising from any property which belongs to it, the provisions of the Act shall extend and apply to the income from the property held by it and not to the voluntary subscriptions. Now this charity, to my mind, at the present time, is plainly maintained partly by the voluntary subscriptions to which I have referred, and partly by income arising from endowment, that is to say, property held in trust for it, inasmuch as the land produces some income. It is now, therefore, what has been called a mixed charity and this portion of the section is applicable to it. The next provision is a proviso upon that part of the section which I have last read: see *In re Clergy Orphan Corporation.* (1) It runs thus: "and no donation or bequest unto or in trust for any such charity as last aforesaid" (that is a mixed charity) "of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act." The land in question is obviously a donation.

(1) [1894] 3 Ch. 145, 151.

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It is equally clear that no special application or appropriation has been directed or declared by the donor in respect of this land. The land was conveyed to the trustees of the deed to be held upon the trusts of the trust deed and the trusts of that deed provided that property subject to the deed could be applied to any charitable purposes that the trustees thought fit. It is equally clear that the proceeds of this land may be legally applied by the trustees of the charity as income in aid of the voluntary subscriptions. The only question, therefore, is whether it is a "donation unto or in trust for any such charity as last aforesaid." It is a donation unto or in trust for a charity which from the time when the voluntary subscriptions to which I have referred were paid, has been in fact maintained partly by voluntary subscriptions and partly by income arising from an endowment. But it is said that the true meaning of the proviso is that, in order that a donation or bequest may come within it, it must be a donation or bequest to a charity which at the time of the donation or bequest is already a mixed charity—that is to say, a charity which is then maintained partly by voluntary subscriptions and partly by income arising from an endowment. Such a construction would lead to some singular results. If the first two gifts to a charity consisted of a donation of land or an endowment, which produced income, and a voluntary subscription, neither would have been given to a mixed charity, and the third gift would be the first which could come within the proviso. So too if all the earlier donations to the charity were voluntary subscriptions and the charity then received a gift of land or other property which produced income, this gift would be excluded from the operation of the proviso, for, until it had taken effect, the charity would not be a mixed charity, while the next gift would come within the scope of the proviso, as at the time when it was made the charity would have become a mixed charity. I am unable to see any reason for such a distinction. The aim of the Legislature was apparently to except from the provisions of the Act in the case of a mixed charity any donation or bequest of the kind referred to in the proviso

and I find it difficult to discover any reason for supposing that it could have been intended to grant the benefit of the proviso to the third gift to a charity but not to the first or second gift to it. I do not think that I am bound to place upon the proviso a construction which would produce such anomalous results. The clause to which the proviso is attached relates to any time at which the charity is being maintained partly by voluntary subscriptions and partly by income arising from endowment. For the purposes of the proviso I have, I think, to consider first whether the charity in question is now a mixed charity, and secondly whether the donation which has been made to the charity is one of which no special application has been directed by the donor and which may legally be applied as income in aid of the voluntary subscriptions. The question is, I think, not whether the charity was at the date of the gift a mixed charity, but whether the charity to which the donation has been made is now a mixed charity. As this is, in my opinion, the proper construction of the proviso, it follows from the facts which I have found in this case that the donation of the land in question comes within the operation of the proviso, that it is exempt from the jurisdiction of the Charity Commissioners, and that the transfer ought to be registered without the restriction in favour of the Commissioners.

R. M.

C. A.

The Attorney-General appealed. The appeal was heard on January 23, 24, 1922.

Tomlin K.C. and *Dighton Pollock* for the Attorney-General.

C. A. Bennett for the respondents.

The arguments sufficiently appear from the judgments.

[The following cases were cited: *In re Duncan* (1); *In re Clergy Orphan Corporation* (2); *In re Gilchrist Educational Trust* (3); *Attorney-General* v. *Mathieson* (4); *In re Orphan Working School and Alexandra Orphanage's Contract* (5); *In re*

(1) (1867) L. R. 2 Ch. 356.
(2) [1894] 3 Ch. 145.
(3) [1895] 1 Ch. 367.
(4) [1907] 2 Ch. 383.
(5) [1912] 2 Ch. 167.

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Richard Murray Hospital (1) ; *In re Stockport Ragged, Industrial and Reformatory Schools* (2) ; *In re Church Army* (3); *Attorney-General* v. *Foundling Hospital.* (4)]

LORD STERNDALE M.R. I think this appeal must be allowed. It arises in this way. On February 22, 1921, there was a trust deed executed, the necessary parts of which are set out at length in Peterson J.'s judgment. (5) By that indenture Mr. Villiers and Mr. Wellesley were appointed trustees of a charity which Mr. Villiers wished to establish, and it was thereby provided that they should hold any hereditaments thereinafter conveyed to them upon certain trusts which are defined by reference to the trusts of what is called later in the deed the general fund. Speaking broadly I think that the general effect of the deed is that the trustees are to hold the property so conveyed to them for the general purposes of the charity, and to apply for those purposes either the income or the corpus. On March 8 a piece of land was conveyed to the trustee to hold upon the trusts of the trust deed, the purchase money for it being provided by Mr. Villiers. On March 17, 1921, the piece of land now in question which was at Shoreditch was conveyed on the same trusts, the purchase money being again found by Mr. Villiers. No question seems to have arisen with regard to the first piece of land. It naturally would not arise owing to the land not being within what I may call the registration area until the trustees wished to dispose of it, and then possibly the purchaser might have raised the question whether they could do so without the assent of the Charity Commissioners. With regard to the second piece of land, the question did arise, and arose very soon, because it was necessary to register the title. When the trustees applied for registration the Registrar refused to register without a certain restriction, which is pointed out in the Land Registry Rules, that being a memorandum or restriction to show that the property

(1) [1914] 2 Ch. 713.
(2) [1898] 2 Ch. 687.
(3) (1906) 75 L. J. (Ch.) 467.
(4) [1914] 2 Ch. 154.

(5) In this report transferred for convenience to the statement of facts, p. 395, ante.

could not be dealt with without the consent of the Charity Commissioners. The charity they said was established in the first instance by the deed of February 22, 1921, but at that time it had nothing to maintain it, either income of any endowment fund or voluntary contributions, or anything else. It had nothing, but on March 8 it did get a piece of land at Leyton. I should think that probably between March 8 and March 17 no rents accrued from it, and therefore there was no income that was in fact applied, but it had that piece of land for its maintenance, and by that, in my opinion, it became an "endowed foundation" within the meaning of s. 66 of the Act. I think that the term "foundation" is used in the broadest possible sense in that section. It does not mean something that has a good firm foundation and can stand. It means anything that has been founded, and I think that it became an endowed foundation, and therefore a charity within s. 66, and that at that time it had no source of support at all from voluntary contributions. Some months later, certain voluntary contributions were made, a sum of 37*l.* 4*s.* 11*d.* by Mr. Villiers, another sum of 200*l.* by the same gentleman, and some smaller subscriptions of five guineas, one guinea and ten guineas, the ten guineas I think again coming from Mr. Villiers, but the five guineas and one guinea from other persons. They were given as donations originally, but all the contributors wrote afterwards and said that their contributions were to be considered as annual subscriptions. Therefore from that time there was a certain fund, not a very large one, but a certain fund of annual subscriptions, which was applicable for the maintenance of the charity. No question is raised as to those being bona fide subscriptions, and not sums simply paid for the purpose of raising the question of partial support by voluntary subscriptions, and I deal with them as being voluntary subscriptions given for the maintenance of the charity.

In those circumstances the question arises, is this property exempted from the jurisdiction of the Commissioners, and are the trustees entitled to deal with it without the sanction of the Commissioners? If it be exempted then the restriction

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which the official of the Land Registry wished to place upon the register is wrong. If it be not exempted that restriction is right. In my opinion that depends upon the proper construction of s. 62 of the Act. Sect. 62 is a section which exempts certain charities from the jurisdiction of the Commissioners. As I have said, this was an endowed charity in my opinion at any rate as soon as it obtained the land at Leyton. Before that I do not know that the charity can be said to have had any existence at all. As an endowed charity it came under the jurisdiction of the Commissioners, unless there is something in s. 62 to take it out, and in order to see whether there is it is necessary to look at the terms of the section. It is a very long section, and I do not propose either to read the whole of it or to comment upon its wording. It has had a good deal of vituperation applied to it by other judges, and I do not see any reason for adding any myself. It begins by exempting certain institutions such as the Universities of Oxford and Cambridge and others. It then goes on to exempt Queen Anne's Bounty and the British Museum and a few other places of that kind. Then it says "or any friendly or benefit society, or savings bank, or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any bookselling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only." I have already said that in my opinion this was not wholly maintained by voluntary contributions, because until it obtained the land at Leyton it was not maintained by anything, and after that the only source of maintenance it had was that land, and it was not until some considerable time after that some voluntary subscriptions came in, and when they did the charity obviously was not wholly maintained by voluntary contributions. That was after the conveyance of the land with which we have to deal, and therefore I think it is immaterial. It does not in my

opinion come under that part of the section, and to come within any part of the section it must come within this: "And where any charity"—I have already said that this in my opinion is a charity—"is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof," which would include the investment which has been made with the voluntary subscriptions. Now, was this charity partly maintained by an endowment and partly by voluntary subscriptions? As I have said, I think it was after those subscriptions were given. Then the section goes on: "and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act." Therefore, if I may take the language of Cozens-Hardy M.R. in *Attorney-General* v. *Mathieson* (1), in order to bring a charity within that section it must comply with certain requirements. In the first place it must be an endowed charity, because the question is whether an endowed charity is exempted or not. Then in the second place, as the Master of the Rolls says: "No charity can claim the benefit of the particular clause which was construed in *In re Clergy Orphan Corporation* (2) . . . . unless it is a charity maintained partly by voluntary subscriptions, and partly by income arising from endowment. In other words, it must be what has been called a 'mixed charity.'" As I have said, I think this charity was such a mixed charity from the time when the voluntary contributions were given, at the time when the application to register was made, and at the time when the matter was considered by Peterson J. and now. Then

(1) [1907] 2 Ch. 383, 393. (2) [1894] 3 Ch. 145.

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the Master of the Rolls goes on: "In the third place, in the case of a mixed charity, a donation, which would otherwise be an endowment of which no special application or appropriation shall be directed or declared by the donor, and which may be legally applied as income in aid of voluntary subscriptions, is not subject to the Act." We have that here. This land is held on those terms. Then the Master of the Rolls continues: "In the fourth place, so long as property, which may be applied as income, is invested, whether in real or personal property, so that it is still legally competent to the governing body to convert the investment into money and apply the money as income, such investment will in like manner be exempt from the Act." I think Cozens-Hardy M.R. was there only repeating what had been laid down as necessary by Davey L.J. in *In re Clergy Orphan Corporation.* (1) I apply those tests to this case. We have here a mixed charity, which became so some months after this transaction. We have a bequest or donation to that charity, which is applicable in the way which is necessary for exemption under the Act. I agree with what Peterson J. said in his judgment, that the one and only question in this case is this, At what time are you to look at the position of the charity in order to see whether it is a mixed charity or not? If it be not a mixed charity at that time, whatever that time may be, the first requisite of its exemption does not exist. Reading the section I should have thought—but for the respect with which I treat Peterson J.'s judgment—that it was abundantly clear from the words: "And where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid," and so on, that that charity must satisfy the condition of being such charity as last aforesaid at the time the donation or bequest was made. That was not, I think,

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the date which was taken by the officials of the Land Registry. They took the time of application for registration. That time was a purely arbitrary date, and I do not think it could possibly have been contemplated; but on the words of the section I can see no reasonable construction of them except this: The section speaks of a "donation or bequest unto or in trust for any such charity as last aforesaid." That must mean that the charity shall possess that character and satisfy that requirement at the time the donation or bequest is made. The learned judge has construed it as meaning at the time when the matter comes under the consideration of the Court. I cannot think that that is so. Mr. Bennett very frankly admitted that he had great trouble with the words of the section, but he said that those words were controlled by certain authorities to which I shall refer very shortly in a moment. Of course, if the land be situated in a registration area the matter must come under the notice of the Court pretty early, because the controversy would arise as soon as the application for registration was made, but if it be situated in any part of the country where registration is not necessary the matter may not come under the notice of the Court for five, ten, fifteen, twenty or even fifty years. When the trustees of the charity wish to dispose, or attempt to dispose of the land, then the question may arise, because the purchaser may take an objection or it may arise in a number of ways. During that long course of years this charity may have changed its nature. It may have become a mixed charity and then ceased to be a mixed charity and become a mixed charity again, and I cannot think that these plain words can ever have been meant to be capable of a construction to bring about such consequences as that. The learned judge alludes to the very great difficulties that might arise in putting the construction upon the section which I think is the right one. He does not specify them, but I cannot think that it could produce results so very curious as the results which would be produced from fixing not a date which can be very easily ascertained but a date which is dependent upon any number of accidents,

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and upon the volition of the trustees as to the time at which they wish to dispose of their land. But I really, if I may say so with the greatest respect, care very little indeed about what consequences may be produced by one or other construction of the section. What I have to do, I think, is to look at the section and see what it says. In my opinion it says most clearly, as clearly as words can do, without putting it into exact language, that the time to be looked at is the time when the donation or bequest is made, because it is a donation or bequest to such charity as aforesaid, that is to say, a charity maintained in the way I have said, partly by voluntary contributions and partly otherwise.

For those reasons I think the judgment was wrong, because I think it is perfectly clear that this was not a mixed charity, as it is called for shortness, at the time when this donation or bequest was made.

I said that I should deal very shortly with the authorities upon which Mr. Bennett for the respondents relies. He quite admits that none of them raises the present point at all, but he says, that looking at the judgments as they are given we must take it that if the point had been raised it would have been decided contrary to the way in which I am deciding it. I confess I cannot attach any importance to that contention. In all the cases the question was not only not directly under the consideration of the Court, but as far as I can see it never was raised in any form by either side, and I cannot accept—as I think was stated by Younger L.J.—the proposition that where the words are pretty plain in the section itself, we must assume that the judges who gave those judgments would have departed from the plain meaning of the words, because they have said nothing about the point in a case in which it was not raised. It seems to me that those authorities really have no bearing on the point at all, and that we are left to decide it as a new point, and deciding it as a new point I come to the conclusion it should be decided as I have said, and that the appeal should be allowed.

WARRINGTON L.J. I am of the same opinion. The question is whether the Attorney-General is entitled to insist, on an application to register the title of a particular piece of land, on the insertion in the register of a caution to the effect that no sale of the land can be made without the approval of the Charity Commissioners. The answer to that question depends upon whether the persons entitled to this land can make out that it is in some way exempted from the general provisions of the Charitable Trusts Acts of 1853 and 1855. The Act of 1855 imposes on all charities subject to the Charitable Trusts Acts this restriction, that it shall not be lawful for the trustees or persons acting in the administration of any charity to make any sale without certain sanctions, and in particular, without the approval of the Board. It is further provided by s. 47 of the Act of 1855 that nothing in the Act shall extend to any of the cases which by s. 62 of the principal Act, that is the Act of 1853, are excepted from the operation thereof. There are two ways by which s. 62 of the Act of 1853 relieves certain charities and certain property of certain charities from the jurisdiction and control of the Board. First it provides that the Act, taking the words of the section, shall not extend to certain charities at all. Secondly, it provides that certain property belonging to certain charities shall not be subject to the jurisdiction and control of the Board. We have, therefore, two questions to decide, first, whether the charity in question is one to which the Act does not extend at all, and secondly, whether the property in question is property which under the provisions of the Act is not subject to the jurisdiction and control of the Board.

The facts are very simple and, except that to state them shortly rather helps me to say what I desire to say as to the conclusion to be arrived at, I should not repeat what the Master of the Rolls has said. On February 22, 1921, a trust deed was executed whereby it was in effect declared that Mr. Villiers, who was a party to it, desired to found a certain charity, and it was then declared that the trustees should stand possessed of property which should be vested in them

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upon this trust: "The trustees shall pay the capital and income of the general fund"—which includes substantially any property which might be vested in the trustees—"to or apply the same for such charitable purposes as the trustees shall from time to time in their absolute and uncontrolled discretion think fit." At that time there was nothing but the trust deed, and there was, therefore, no charity at all within the definition of s. 66 of the Act of 1853 which defines charity as meaning "every endowed foundation and institution taking or to take effect in England or Wales" with certain other particulars which I need not mention, but on March 8, 1921, Mr. Villiers caused to be conveyed to the trustees certain land to be held by them upon the trusts of the trust deed. Thereupon there was an endowed charity within the meaning of the Act.

Then I come to consider the first of the two questions. Was that endowed charity one to which the Act shall extend? Sect. 62 provides that: "This Act shall not extend to" a number of institutions which I need not read, "or any institution, establishment, or society for religious or other charitable purposes . . . . wholly maintained by voluntary contributions." It is impossible to say that this was a charity wholly maintained by voluntary contributions, for there were at this time no voluntary contributions being received at all. It is perfectly true that the original endowment was given voluntarily, but that cannot be included for this purpose in the expression "wholly maintained by voluntary contributions," otherwise the Act could never apply to a charity at all or certainly not to a newly founded one. It seems to me, therefore, that the charity at the time of this conveyance, with which we have to deal, which was dated March 17, 1921, was made was a charity to which the Act extended, because it was an endowed charity and not one maintained wholly by voluntary contributions. If it was maintained at all it was maintained by the rents and profits of this land if there had been any, but it was either not maintained at all or it was certainly not maintained by voluntary contributions. Then the conveyance of March 17

was thereupon made of certain land which happens to be subject to the compulsory registration provisions, and it is by reason of that fact that the question comes before us in the form in which it does. With reference to that land, the question is a different one. It is not whether the Act extends to the charity. That question I have already answered in the affirmative, but it is whether that land is a donation or bequest not subject to the jurisdiction of the Board. Those are the words which appear in a later part of s. 62 of the Act of 1853. They appear in this context: "Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act." Now this land was conveyed to the trustees, and the trust to which it is subject enabled them to dispose both of capital and of income for the purposes of their charity. So far it satisfies the definition of the donation or bequest which is not to be subject to the jurisdiction or control of the Board, but is the previous part of the definition satisfied? That is "No donation or bequest unto or in trust for any such charity as last aforesaid." The charity last aforesaid is the charity which is maintained partly by voluntary contributions and partly by income arising from any endowment. At the date when the conveyance was made, as I have already said, there were no voluntary contributions, and therefore the charity was not at that time maintained partly by voluntary contributions. If it was maintained at all it was maintained by the income of the endowment. It would, therefore, seem so far to be

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clear that this property is not such a donation or bequest as is mentioned in the section. But it is said, and Peterson J. has adopted this argument, that in order to obtain exemption on this part of the section it is enough if it is shown that at the time the matter comes up for decision that the charity is one maintained partly by the income of the endowment and partly by voluntary contributions. It is from that view of Peterson J. that I venture to differ. How can it possibly depend upon a perfectly uncertain date at which the question may come up whether a donation is or is not made to a charity which answers a certain description? Peterson J. has alluded to some absurd results which might follow from the view which the Master of the Rolls has expressed, and which I am about to express, but he has neglected altogether to notice the equally absurd results which might follow from his own view. For example, supposing this Court were to come to the conclusion that on this day, January 24, 1922, the institution was not partly maintained by voluntary subscriptions, and a person to-morrow were to make a subscription of one guinea, the trustees could then go to the House of Lords and obtain a reversal of this judgment, not because the judgment was incorrect when it was pronounced but because something had happened since to make it incorrect, and so one may put any number of extraordinary consequences which would flow from any such uncertain date as the time when either the question comes up for decision by the Court or, as Mr. Bennett preferred to put it, the time when the trustees wish to dispose of the property in question. In truth, when one speaks of making a gift to a person or a number of persons, or an abstraction answering a certain description, surely one means answering that description at the time the gift is made. Mr. Bennett indeed admitted that on the words of the section, unobscured by subsequent authority or decision, that would be the correct conclusion to arrive at, but he said that certain decisions alluded to by the Master of the Rolls had obscured the plain meaning of the words taken by themselves. In my opinion they have done no such thing, for the simple reason

that the question we have to decide did not come up before the Court in those cases at all. The conclusion I have arrived at is that neither is this charity one to which the Act does not extend, nor is this particular property of the charity property which by the provisions of s. 62 is exempted from the jurisdiction and control of the Board.

The result is that in my opinion the appeal succeeds, and an order ought to be made providing for the addition of the note in question to the registration.

YOUNGER L.J. I confess that this case presents itself to my mind as one of great difficulty, because I am very conscious of the inconvenient results which it would appear must follow from any decision that may be given. I feel with my Lord and the Lord Justice that there are serious inconveniences following the view expressed by the learned judge, but I wish I could feel any confidence that the inconveniences which flow from the decision of this Court are less serious. The inconveniences really arise, I think, from this, that the Court is bound, on the view of this Act adopted in previous authorities binding upon us, to place upon its relevant provisions a construction which, so far as this question is concerned, necessarily involves inconvenience in one direction or another.

The word "endowment," as defined in s. 66 of the Act of 1853, and as interpreted by Davey L.J. in *In re Clergy Orphan Corporation* (1), is a word of the widest signification when used in this statute, but it would not have been difficult to find reasons for holding that, however comprehensive the content of the word, the Legislature had thought it right to enact by this statute that all endowments as so defined and their disposition, were in some sense to be under the control or supervision of the Charity Commissioners. But the difficulty of the case, as I see it, arises from this, that the Legislature has not thought fit so to enact, it being undoubtedly true that in the case certainly of some charities—to wit mixed charities—endowments for general purposes, the

(1) [1894] 3 Ch. 145.

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corpus as well as the income of which are legally applicable to their maintenance, are in no way subject to the jurisdiction of the Commissioners. The difficulty is to ascertain why a similar freedom with reference to such endowments is not given to all charities, and why in particular it is not enjoyed with regard to all its endowments of that description by the charity here in question, which certainly is now a mixed charity, for it is agreed, on both sides, as the result of the evidence filed in these proceedings, that this charity to-day is a mixed charity, and that if Mr. Villiers were minded now to convey to its trustees real estate in the identical terms in which on March 17, 1921, the real estate now in question was conveyed the trustees would be entitled to have that conveyance registered free from restriction. On that, one asks oneself the question, Is there any intelligible reason, apart from the actual words of the Act, why the right of unrestricted registration and unrestricted disposition which the trustees would have with reference to property presently conveyed to them should not equally extend to the property now in question? The answer I think must be that there is none, if, but only if, it be true to say that an endowment held by a charity—not a mixed charity—as to which no special application or appropriation had been directed or declared by the donor or testator, might lawfully be applied as income, and was accordingly beyond the jurisdiction of the Commissioners.

If that were true the reason for the insertion of this special privilege in relation to a mixed charity would be apparent. It would merely be to retain without doubt or question for a mixed charity the exemption from control in relation to its disposition of an endowment in that condition which is enjoyed by all other charities. In other words, the exemption would continue when and so long as the charity is and remains a mixed charity, the implication being that at no other time and in no other circumstances is any exemption necessary. It is already enjoyed. An endowment like the present would always be entitled to unrestricted registration.

But this view cannot, in my judgment, be taken in the

absence of authority in support of the basic proposition on which it rests. I have so far been unable to find, nor has Mr. Bennett been able to produce, any such authority. In the absence of such authority the question, solely one of construction of s. 62 of the statute, is whether the relevant period with reference to which the existence of the restriction in the present case must be ascertained is or is not that defined by the learned judge. My Lord and the Lord Justice arrive at the conclusion on the words of the section and on the words of the section alone, that the moment at which it has to be ascertained whether the charity to which this conveyance has been made was or was not a mixed charity is the moment at which the conveyance was made to the trustees, and, inasmuch as it is agreed that at that moment the charity was not a mixed charity it must follow that this particular property is not entitled to the exemption which is given by s. 62. Concurring as I do in that construction as a mere matter of words, I agree with my Lord and the Lord Justice in thinking that this appeal must be allowed.

Appeal allowed.

Solicitor for Attorney-General: *The Treasury Solicitor.*
Solicitors for respondents: *Slaughter & May.*

W. I. C.

PETERSON J.

1921

Dec. 2, 6, 7, 21.

In re STURT.

DE BUNSEN *v.* HARDINGE.

[1921. S. 2639.]

Settlement—Real Estate—Trust for Conversion—Settlor at Death entitled to contingent reversionary Interest in Proceeds of Sale—Devise of Property by Settlor's Will as Real Estate on strict Legal Limitations—Interest absolute after Settlor's Death—Reconversion—Election—Realty or Personalty.

A testator who was entitled in reversion expectant upon the determination of his wife's life interest and, contingently upon no issue of the marriage living to attain a vested interest, to the proceeds of sale of certain real estate conveyed by him, upon his marriage in 1880, to trustees upon trust for sale, died in 1886 in his wife's lifetime, having devised the real estate, which had remained unsold, to the use of his wife for life with remainders over by way of legal limitations in strict settlement. There was no issue of the marriage. The real estate was not sold in the lifetime of the wife, who accepted the benefits under her husband's will and died in 1921:—

Held, that inasmuch as at his death the testator's interest was a contingent reversionary interest in personalty, contingent upon the event of no posthumous child being born who might attain a vested interest, and reversionary because it was expectant upon his wife's life interest, the testator was not competent to effect a reconversion by his will, because he never became entitled to an absolute interest in the property before his death; and that the property passed under his will as personalty.

Stead v. *Newdigate* (1817) 2 Mer. 521 and *Sisson* v. *Giles* (1863) 3 D. J. & S. 614 explained.

Meek v. *Devenish* (1877) 6 Ch. D. 566 commented upon.

ADJOURNED SUMMONS.

By a conveyance dated June 1, 1880, made in contemplation of his marriage, Colonel Sturt conveyed a freehold house called "The Priory," Folkestone, and the gardens belonging to it to trustees in fee simple upon trust at the request of him and his wife during their joint lives and of the survivor during his or her life and thereafter at the discretion of the trustees to sell the same premises and to hold the proceeds of sale and the rents until sale upon the trusts of another deed of even date. By the latter deed it was declared that the proceeds of sale should be invested and that the income should be paid during the joint lives of the husband and wife to the wife and then to the survivor during his or her life and after the

decease of the survivor the corpus was to be held in trust for the issue of the marriage as therein mentioned, and if there should be no children who should attain a vested interest (as happened), the trustees were directed to hold the corpus in trust for the husband his executors administrators and assigns. The settlement provided that the rents and profits until the sale were to be applied in the same manner as income derived from investments of the proceeds of sale.

Colonel Sturt died in 1886 leaving his wife surviving him. There was no issue of the marriage. In the events which happened the only persons who were interested under the settlement were Colonel Sturt and his wife, and on his death his estate was entitled to the capital of the settled property subject to the life interest of his wife and the possibility of the birth of a posthumous child who should live to attain a vested interest.

By his will made in 1882, Colonel Sturt devised the lands comprised in the conveyance of 1880 under the description of "my mansion house of The Priory with the pleasure grounds gardens plantations lands rights easements and appurtenances thereunto belonging" and all other his hereditaments at Folkestone or elsewhere in the County of Kent and all other his real estate to the use of his wife for life with remainder to the use of his brother, Lord Alington, for life without impeachment of waste with remainder to the use of his eldest son Humphrey Sturt for life without impeachment of waste with remainder to the second and every other son of the said Humphrey Sturt successively in tail male with remainder to the use of the first and every other son of the said Humphrey successively in tail with remainder to the use of the first and other daughters successively in tail with a number of other limitations in remainder in strict settlement and an ultimate remainder to the use of the testator's own right heirs. The will contained a power to lease the premises comprised in the devise, and conferred upon the trustees of the will a power of sale and exchange over all the premises thereinbefore devised except the said messuage and premises known as "The Priory." The testator disposed of his

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copyhold and leasehold hereditaments upon trusts corresponding with the uses of the devised real estate; he bequeathed certain jewellery to the trustees upon trust for his wife for life and after her death upon other trusts, which it is not material for the purposes of this case to mention; he bequeathed all his household effects in "my dwellinghouse at 61 St. James's Street, London, and 'The Priory,' Folkestone, aforesaid," and 700*l.* to his wife; and he bequeathed his residuary personal estate to his trustees upon the trusts applicable to the moneys to arise from the sale of the hereditaments and premises thereinbefore devised in strict settlement under the power of sale thereof thereinbefore contained.

The will gave power to the trustees to alter or add to "The Priory," and directed that during Mrs. Sturt's life "The Priory" should not be let or lent to any person. By a second codicil the testator revoked the prohibition against letting or lending "The Priory" and empowered Mrs. Sturt to let "The Priory" for any term not exceeding one year.

Mrs. Sturt accepted the benefits conferred upon her by her husband's will and died in February, 1921. She thus, apart from minor benefits, enjoyed the income of the residuary personal estate, which was very considerable, and the rents of the real estate belonging to the testator, which was disposed of by the devise, which included "The Priory."

This was a summons taken out by the trustees of Colonel Sturt's will for the determination (inter alia) of the question whether "The Priory" and premises comprised in the above-mentioned conveyance of June 1, 1880, passed under the specific devise thereof contained in Colonel Sturt's will as real or as personal estate.

Beebee for the plaintiffs.

Hughes K.C. and *Sanger* for the first defendant interested in the property devolving as real estate. This property passed under the testator's will as real estate. At the time of his death he was entitled to it absolutely subject only to his wife's life interest and to the birth of a posthumous child. By his will he specifically devised it to uses and showed an obvious

intention to deal with it as real estate. He was in a position to elect whether it should go as land or money. In *Crabtree* v. *Bramble* (1) the acts of a reversioner were taken as showing an intention to retain the property as land, and in *Stead* v. *Newdigate* (2) Sir William Grant M.R. said that a reversioner might dispose of his interest by whatever denomination he thought fit, and if it clearly appeared that his meaning was that it should pass under the description of his real estate, there was nothing to prevent his intention from having effect. There can be reconversion by conduct: *Mutlow* v. *Bigg* (3), and a reversioner contingently entitled can direct that upon the contingent event happening in his favour he will retain the land in specie: per Malins V.-C. in *Meek* v. *Devenish.* (4) Moreover the testator's widow assented to "The Priory" being retained as land and assumed and thought that "The Priory" would devolve under her husband's will as land.

Tomlin K.C. and *Underhill* for another defendant interested in the property devolving as real estate. We contend that this is real estate. A trust for conversion may be brought to an end in many ways. If the property is "at home" no question of election arises, it can only arise when a man is not in a position to say that he is absolute owner, and therefore it may or may not become operative, and that result depends upon whether he has expressed an intention to elect, and if so, can it, in the events which happen, operate? So that a man contingently entitled can say that if the contingency happens in his favour and the land is not then sold, he desires it to remain land. We submit that there can be no doubt that would be good. This testator has dealt with this property in his will as real estate and it was competent to him to do so: per Farwell L.J. in *In re Lord Grimthorpe* (5) and per Lindley L.J. in *In re Lowman.* (6) All the parties are taking under the will, which expresses the intention that this property shall pass as real estate, and the persons claiming it as converted into personalty can have no conceivable equity so to

(1) (1747) 3 Atk. 680.
(2) 2 Mer. 521, 531.
(3) (1875) 1 Ch. D. 385.
(4) 6 Ch. D. 566, 572.
(5) [1908] 2 Ch. 675, 680.
(6) [1895] 2 Ch. 348, 354.

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treat it. The testator's widow has clearly shown that she never meant to insist on the trust for sale, and that she accepted and adopted the position that it should remain as real estate.

Manning K.C. and *Bryan Farrer* for a defendant interested in the property devolving as personalty. The testator was never in a position to reconvert this property, and it therefore passed under his will as personalty and vested absolutely in the first person who took more than a life estate. *In re Lowman* (1) illustrates how to treat the present case; no doubt the testator's interest passes, but in what quality did it pass? We submit that it passed as personalty. A person entitled contingently or in reversion cannot reconvert; to do that he must be absolute owner in possession: *Sisson* v. *Giles* (2) recognized in *In re Douglas and Powell's Contract* (3); *Walrond* v. *Rosslyn.* (4) The cases relied on by the parties claiming this as reconverted do not on examination support their contention. Only a person absolutely entitled could elect to take this property as real estate: per Pearson J. in *In re Lewis* (5), and the testator never was absolutely entitled in his lifetime.

Harman (*Cunliffe K.C.* with him) for another defendant interested in the property devolving as personalty. A trust for sale can be determined only by an absolute owner: Lewin on Trusts, 12th ed., p. 502. This was personalty at the testator's death and his will can only deal with it as such; he had no power to put an end to the trust for sale; and the beneficiaries under his will must take the property as they find it at his death.

Turnbull for the testator's heir at law and next of kin.

Tomlin K.C. in reply.

Cur. adv. vult.

Dec. 21. PETERSON J. stated the material portions of the testator's will and the facts as above set out, and continued: From this statement of Colonel Sturt's will it is plain that

(1) [1895] 2 Ch. 348, 354.
(2) 3 D. J. & S. 614.
(3) [1902] 2 Ch. 296, 312.
(4) (1879) 11 Ch. D. 640.
(5) (1885) 30 Ch. D. 654, 656.

he treated "The Priory" as real estate which belonged to him. The will even purported to devise a life estate in "The Priory" to Mrs. Sturt and, possibly from forgetfulness, omitted to recognize that under the settlement of 1880 she already had a life interest in the proceeds of sale. In these circumstances the question is whether "The Priory," which has not been sold, is for the purposes of Colonel Sturt's will to be treated as realty or personalty; for some of the persons interested under the will claim that having been converted by the trust for sale into personalty it has never ceased to be personal estate, while others contend that in the events which have happened it has been reconverted into realty and passes to the various persons interested under the will as real estate. It is very possible that when Colonel Sturt made his will he had forgotten the existence of the settlement of 1880, but, if he had, that fact does not appear to me to be material. His will shows that he considered "The Priory" was real estate and that he intended to dispose of it as real estate. If "The Priory" is to be treated as personalty it will vest absolutely in the first person who becomes entitled under the will as tenant in tail and the subsequent limitations will be inoperative.

It is contended that no person who takes under the will can deny that what the testator has treated as land ought to be treated as land and that they have no equity to insist that it is personalty. But this is not in my opinion a sound argument. If the property is in the eyes of the law personalty the testator could not by the provisions of his will dispose of it to uses and upon trusts which the law does not admit in the case of personalty; he cannot convert the personalty into land by declaring that it is to be deemed to be land or by declaring that it is to devolve as land. He can only effect his purpose by a trust for conversion: see *In re Walker* (1) and *In re Aspinall's Settled Estates.* (2) If in law the property is personalty the only interests which can be created in it, in the absence of a trust to convert into land, are those which are permissible in the case of personalty. Thus, if a testator

(1) [1908] 2 Ch. 705. (2) [1916] 1 Ch. 15.

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settles personalty in strict settlement as if it were real estate, the first tenant in tail, subject to any preceding life interest, takes the absolute interest, although this manifestly defeats the intention of the testator that the property shall go to successive tenants in tail. But a testator who is absolutely entitled under a settlement of land upon trust for sale may by his will elect to take the property in its unconverted state. His election would operate as a reconversion of the personalty into realty.

Reliance was placed on some passages in the judgments of the Court of Appeal in *In re Lord Grimthorpe.* (1) In that case Lord Grimthorpe, who was absolutely entitled under a settlement by him of his Lincolnshire estates on trust for sale after his death and who was therefore entitled to call on the trustees of the settlement to convey the estate to him, devised his interest in those estates to his successor, Lord Grimthorpe, in fee, and by a codicil he appointed the estates to his nephew, Ernest, who was in fact the second Lord Grimthorpe. The Master of the Rolls decided that the properties passed by his will as land, not because the testator had by his will reconverted the property but because at the time of the testator's death there was no enforceable trust for sale, and consequently there was no one who could properly say that the property which was in fact land should be turned into money after his death : see per Lord Cozens-Hardy M.R. in *In re O'Grady's Settlement.* (2) But Lord Buckmaster in *O'Grady* v. *Wilmot* (3) points out that the case of *In re Lord Grimthorpe* (1) was a mere case of reconversion by the person who at the moment of death was the absolute owner of all interest under the settlement: see also the observations of Neville J. in *In re Ffennell's Settlement.* (4) The other two members of the Court which decided *In re Lord Grimthorpe* (1) used expressions on which counsel, who argued that in this case " The Priory " passed under the will as real estate, relied. Fletcher Moulton L.J. held that the language of the will and codicil showed an

(1) [1908] 2 Ch. 675, 680.
(2) [1915] 1 Ch. 613, 618.
(3) [1916] 2 A. C. 231, 245.
(4) [1918] 1 Ch. 91.

intention to leave the property as real estate. He then proceeded to say: "That being so, the decision of Sir William Grant in *Stead* v. *Newdigate* (1) carries the respondent the whole way, because that learned Master of the Rolls laid down, in a case somewhat similar to the present, but by no means so strong, that it was possible for the testator to leave property as real estate if he chose to make it clear by his will that it was his intention to do so, there being in that case a trust for conversion, as there was a trust here." Farwell L.J. said: "I do not think it can be doubted from Sir William Grant's statement in *Stead* v. *Newdigate* (1) that in a case such as that was, which is far stronger than the present (because the widow there survived the tenant for life), it is competent to a testator to declare by his will that property, subject to a trust for sale, should be taken, when it came to the persons taking under his will, as real estate." It is suggested that these observations of the two Lords Justices mean that, apart from any question of reconversion by his will, a testator can effectually declare that for all the purposes of his will personalty shall be deemed to be realty, and that accordingly that which is in fact personalty shall have all the attributes and incidents of realty. Such a contention is inconsistent with the principles of the cases to which I have referred and in my view does not represent the true meaning of the learned Lords Justices. They were dealing with the case before them, and that case was one in which a testator, who at the moment of his death was absolutely entitled as the only person interested under the settlement in trust for sale, devised the land which was the subject of the settlement as real estate, and it was only in reference to the facts of that case that the observations in question were made. A consideration of the judgment of Sir William Grant in *Stead* v. *Newdigate* (2) shows, I think, that he had not in mind any such contention as that which has been suggested in this case. In *Stead* v. *Newdigate* (2) land had been settled by marriage articles upon trust after the death of Sarah Nicoll for sale. The trusts of the proceeds

(1) 2 Mer. 521. (2) 2 Mer. 521, 531.

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of sale were for the husband, Francis Newdigate, who was the settlor for life, then for the children of the marriage and in default of children for Francis Newdigate his executors administrators and assigns. Both Sarah Nicoll and Mrs. Newdigate survived Francis Newdigate. Francis Newdigate died without issue. By his will Francis Newdigate, after confirming the settlement, gave his residuary personalty to his wife absolutely and devised all his real estate to his wife for life with remainder to the defendant in tail male. The question, so far as is material for this case, was whether the property comprised in the settlement passed under the devise of realty or under the residuary bequest. The Master of the Rolls after holding that by virtue of the trust for sale the settled estate was converted into personalty then proceeded: "Then the question is, under what description it passes by the husband's will," i.e., did it pass under the devise of realty or under the gift of residuary personalty? In considering this question he disposes of the contention that the fact that the land had not been sold was an important fact by observing that the time for selling under the trust for sale did not arise in the husband's lifetime, and the mere fact that the land was not sold in the testator's lifetime could not show that he had elected to keep it as land even if he was in a position to elect. Then follow the sentences on which reliance has been placed: "But still he might dispose of his reversionary interest in the property, by whatever denomination he thought fit. And if it clearly appeared, that his meaning was that it should pass under the description of his real estate, there is nothing to prevent his intention from having effect." To my mind it seems clear that the Master of the Rolls was still dealing with the question under what description the husband's interest under the settlement passed by his will, and that the passage which I have quoted is only a statement that if the will showed that he regarded his interest as realty it would pass under the devise of his real estate and not under the gift of residuary personalty. *In re Lord Grimthorpe* (1) is an illustration of the meaning of Sir William Grant. That

(1) [1908] 2 Ch. 675.

this is what the learned Master of the Rolls meant and all that he meant is, I think, shown by the preceding sentences in his judgment where he points out that in the husband's will there was nothing from which it could be inferred whether he considered the interest in question as part of his real estate or as part of his personalty, and that as in the eyes of the law the interest was personalty the onus lay on the defendant to show that the testator meant to dispose of it as realty. The observations in this judgment on which reliance has been placed relate merely to the question whether the interest was included in the devise of realty or in the bequest of personalty, and afford no ground for the suggestion that, if personalty is in fact devised as realty, all the incidents of realty attach to it as between the persons taking under the will, so that, for instance, it could be devised to a series of persons in tail and the operation of the rule that personalty vests absolutely in the first tenant in tail could be excluded: see Jarman on Wills, 6th ed., vol. i., p. 762.

The real question is whether that which has happened amounts to a reconversion or, in other words, was Colonel Sturt able to elect to take the property comprised in the settlement of 1880, which has never been sold, as land, and, if he was, is his will sufficient evidence that he elected to do so? If he was competent to elect I feel no doubt that the dispositions of his will show that he did elect. The limitations of "The Priory" are consistent only with the view that Colonel Sturt thought that the property he had to dispose of was land and that he intended to dispose of it as land: see *In re Lord Grimthorpe* (1) and *Meek* v. *Devenish*. (2) The difficulty which gave rise to the greater part of the discussion in this case was caused by the question whether Colonel Sturt ever was in a position to elect to take as land what was in the eyes of the law personal estate. Under the settlement the trustees were to hold the proceeds of sale in trust for Mrs. Sturt for life, then for Colonel Sturt for life if he survived, and then subject to a power of appointment among issue for such of the children of the marriage as should

(1) [1908] 2 Ch. 675. (2) 6 Ch. D. 566.

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attain 21 years of age or being daughters marry, with an ultimate trust for Colonel Sturt if there should be no child of the marriage who should attain 21 or being a daughter marry. At the moment of his death Colonel Sturt's interest under his settlement was a contingent reversionary interest in personalty, contingent upon the event of no child of the marriage attaining the age of 21 or being a daughter marrying, and reversionary because, if no child attained a vested interest, the interest of Colonel Sturt was subject to his widow's life interest. This is not a case in which the evidence shows that owing to the age of the wife or other circumstances there was at Colonel Sturt's death no possibility of issue of the marriage. The case was argued on the basis that as his wife survived him there might after Colonel Sturt's death have been a child of the marriage who should marry or attain the age of 21.

The general proposition of the law applicable to cases of reconversion is correctly stated in Jarman on Wills, 6th ed., vol. i., p. 761: "In order to amount to an election to take property in its actual, as distinguished from its eventual or destined, state, the act must be such as to absolutely determine and extinguish the converting trust." The consequence of this principle is that, to use the words of Lord Westbury in *Sisson* v. *Giles* (1): "To effect a reconversion, the parties directing it must be absolutely interested in the property in question": see Jarman on Wills, 6th ed., vol. i., pp. 761 and 762, and cases cited there. A person having a limited or defeasible interest cannot effect a reconversion. Thus in *Sisson* v. *Giles* (1) there was a devise of land upon trust for sale, and a direction that the residue of the proceeds of sale should be held in trust for Naylor and Mary Giles, their respective executors administrators and assigns in equal shares provided that if either of them should die without leaving issue his or her share should go to the other of them, and that if both died without leaving issue the residue of the proceeds of sale should be held in trust for the next of kin of the testatrix. Naylor and Mary Giles

(1) 3 D. J. & S. 614, 621.

and her husband executed a deed poll by which, after reciting that the property had been retained unsold at their request, they released the executors and trustees in respect of the personal estate and the rents and profits of the real estate of the testatrix subject nevertheless and without prejudice to the right of Naylor and Mr. and Mrs. Giles and their respective heirs and assigns to require a conveyance of the real estate when they or their heirs or assigns should be absolutely and indefeasibly entitled to the same. Naylor died leaving issue, and persons claiming under his will then raised the question whether the deed poll had effected a reconversion. The Lord Chancellor held that as the parties to the deed poll had only limited or defeasible interests they were not sufficiently "domini" of the property to effect a reconversion.

In *Stead* v. *Newdigate* (1) Sir William Grant made some observations which are relevant to the present question. As will be seen from the summary of the facts which I have already given, Francis Newdigate was under a settlement of the land upon trust for sale entitled to a life interest in the proceeds of sale while after his death the proceeds were to be held in trust for the children of his marriage with Elizabeth Stead, but if there were no such children then for Francis Newdigate his executors administrators and assigns. Mrs. Newdigate survived Francis Newdigate, and there was no issue of the marriage, but as Mrs. Newdigate survived her husband there was at his death a possibility of issue. The Master of the Rolls observed that the fact that the property remained unsold afforded no argument of any election on Mr. Newdigate's part to treat it as land "supposing he could have made any such election." His next two sentences state the reasons for thinking that he was not competent to make an election. His words are: "But there was no moment of his life, at which the absolute interest in the property, whether as land or money, could be said to be his. His wife, who might insist on a sale, was alive; and there was a possibility of issue of the marriage." The judgment in that case so far

(1) 2 Mer. 521, 531.

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from assisting those who contend for a reconversion in this case appears to me to indicate that if a man at the time of his death has an interest which is contingent upon there being no child of the marriage and there is a possibility of issue owing to the fact that his wife survives him he is not competent to reconvert.

Meek v. *Devenish* (1), on which the supporters of reconversion in this case relied, does not in my opinion assist them. In that case a testator gave all his real and personal estate to trustees upon trust for sale and directed that the trustees should out of the income of the investment of the proceeds of sale pay an annuity to his wife during her widowhood and pay the balance of the income during such widowhood to his son until he should do or suffer something which should cause the income to be applicable to the payment of his debts, and, on the happening of any such event, to the testator's widow; and after the death or second marriage of the widow upon trust to pay one moiety of the trust funds to the son absolutely, and as to the other moiety, if the interest given to him during the wife's widowhood had not been determined, for the son absolutely, but, if it had, upon trusts in favour of the son and his wife and children. The son died leaving him surviving his mother, his wife and two children. During his life nothing happened which could effect the determination of the interest given to him during the widowhood of his mother. At the moment of his death he was in fact absolutely entitled to the proceeds of sale of the settled property subject to the annuity given to his mother, and the contingency on the happening of which the second moiety was given away from him ceased to exist. He made a will which, if he was competent to elect, effected a reconversion. Dealing with these facts the learned Vice-Chancellor expressed the opinion that a man may elect during the period while his interest is contingent. There may be some passages in the Vice-Chancellor's judgment which, taken by themselves, may be read as meaning that in all cases if a man elects while his interest is contingent the election is binding when the

(1) 6 Ch. D. 566, 571.

contingency happens as if it were made afterwards. But the following passage shows that he was considering the case of a man becoming absolutely entitled before or at his death and having previously elected to reconvert whilst his interest was contingent. The Vice-Chancellor says: "The other point which I have to decide here (and it is one upon which I have had not the slightest doubt from the moment the case was opened) is, whether a person who is entitled absolutely in a contingent event may not, before the happening of the contingent event, bind the trustees and say to them, 'If the contingent event happens before my death I will elect to have this property kept in specie.' . . . . It is not necessary that he should be absolutely entitled to the whole property when he gives the notice, but when he becomes entitled the previous notice is operative." Applying this principle to the facts, the Vice-Chancellor said: "In this case the testator, George Meek the younger, was absolutely entitled unless an event should happen which never did happen, and therefore if he had given formal notice to the trustees they would have been bound to obey that notice when it was ascertained, as it was on his death, that in the event that happened he became absolutely entitled to the property." This in effect was a decision that if a man elects to take property in its unconverted state while his interest is contingent the election becomes operative if during his life he becomes absolutely entitled. That was the question which the Vice-Chancellor had to determine; and if, as I think was not the case, his observations were directed to the case of a person who during his life was never entitled to more than a contingent interest, they would appear to be in the nature of obiter dicta. I observe that the Vice-Chancellor is reported as saying that *Mutlow* v. *Bigg* (1) supported his view as to the power of a person contingently entitled to elect. But *Mutlow* v. *Bigg* (1) was a case in which three persons were absolutely entitled to the proceeds of sale of a house devised in trust for sale subject to two unpaid legacies, and the Court of Appeal held that they had elected to take the house unconverted and the

(1) 1 Ch. D. 385.

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unpaid legatees had assented. That was a case in which all the persons interested by their conduct showed that they had agreed that the trust for sale should be determined and no question of the right of a person contingently entitled arose. I am inclined to think that the citation of *Mutlow* v. *Bigg* (1) was directed to the contention that George Meek the younger was not the only person interested under the trust for sale, as under the will of the father the mother was entitled to an annuity of 750*l.* per annum out of the income of the investment of the proceeds of sale, and that she was entitled to require the trustees to execute the trust for sale: see *Walrond* v. *Rosslyn*. (2) The plaintiff's counsel seem to have used *Mutlow* v. *Bigg* (1) for the purpose of assisting the Court to come to the conclusion that George Meek the younger and his mother had by their conduct in connection with the real estate devised upon trust for sale showed a determination that it should be taken in its unconverted state, and it will be seen that, apart from this reference to *Mutlow* v. *Bigg* (1), the learned Vice-Chancellor did not deal with the question what effect the existence of the annuity had upon the son's election. In the course of his judgment the learned Vice-Chancellor dealt with the case of *Sisson* v. *Giles* (3), but he seems to me rather to have stated the grounds on which he would have decided the case than to have explained the principles on which the Lord Chancellor in fact decided it. When the deed poll in *Sisson* v. *Giles* (3) was executed, Naylor and Mr. and Mrs. Giles were not absolutely entitled to the proceeds of sale of real estate, but at the moment of Naylor's death they were between them absolutely entitled. Having regard to the opinion expressed by him in *Meek* v. *Devenish* (4), the Vice-Chancellor would I gather have determined that there was an effective reconversion as at the death of Naylor but for the fact that Mrs. Giles as a married woman was under disability. But this is not the ground upon which the Lord Chancellor decided *Sisson* v. *Giles*. (3) After referring to the fact that Stuart V.-C. thought that the execution of

(1) 1 Ch. D. 385.
(2) 11 Ch. D. 640.
(3) 3 D. J. & S. 614.
(4) 6 Ch. D. 566.

the deed poll was sufficient to effect a reconversion, the Lord Chancellor held that persons having a limited or defeasible interest could not effect a conversion, and that when the deed poll of 1851 was executed the interests of both Naylor and Mr. and Mrs. Giles were at once executory and defeasible and not such as could be dealt with either apart from or by virtue of the marital right of Mr. Giles : see *In re Douglas and Powell's Contract.* (1) The reasoning of the Lord Chancellor in *Sisson* v. *Giles* (2) seems to me to be inconsistent with that of the Vice-Chancellor in *Meek* v. *Devenish.* (3) But whether this be so or not, none of the cases to which I have been referred establish that a man, who at his death has only a contingent or defeasible interest, can by his will effect a reconversion which becomes operative if the contingent interest becomes an absolute interest at some time after his death. No case has gone further than *Meek* v. *Devenish* (3), and the decision in that case was that a man who is entitled absolutely in a contingent event, may, before the contingent event happens, effectually elect to reconvert if the event happens before his death.

In my opinion Colonel Sturt was not competent to effect a reconversion by his will, as at his death he was only contingently entitled to the proceeds of sale of the property comprised in the settlement. He died before the interest became absolute and never was in a position even with the concurrence of his wife to require the trustees of the settlement to convey the property to him. It is fallacious to say that Colonel Sturt became entitled to an absolute interest; he never had more than a contingent interest. It was his successors who became entitled to the absolute interest when the contingency happened.

Having regard to the view which I have formed, I do not think it necessary to consider what effect the existence of Mrs. Sturt's life interest under the settlement had upon Colonel Sturt's competency to elect. If he had been absolutely entitled subject to her life interest an effective

(1) [1902] 2 Ch. 296, 312. (2) 3 D. J. & S. 614.
(3) 6 Ch. D. 566.

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election could only be made by the action of both of them. But it may be that if the difficulty occasioned by the contingent nature of his interest were removed Mrs. Sturt's assent to reconversion might be inferred from the fact that she accepted the benefits under her husband's will and from the provisions of her own will. But I do not find it necessary to determine this question.

There is one other suggestion with which I ought to deal. It is said that a person contingently entitled to proceeds of sale of land settled upon trust for sale can by his will provide that if after his death the interest becomes absolute and the property has not then been sold it shall go as land to the uses created by his will. Whatever might be the effect of such a direction it is not the provision made by this will. The case supposed is that of a contingent devise of a fee simple estate, while the devise in this case is an immediate gift of a contingent interest. But it may also be observed, that in the case supposed, until the contingency happened the testator's interest would either pass under a gift of residue or devolve as personalty which had not been disposed of. In the case of a will which contained a residuary bequest such a disposition would give the testator's interest in the proceeds of sale until the contingency happened to the persons entitled to his residuary personal estate, and provide that when the contingency happened the property should go away from the persons absolutely entitled to the personalty and pass to other persons as real estate. This is, I think, very far from what the testator has done in this case.

Solicitors: *Pickering & Co.; Withers, Bensons, Currie, Williams & Co.; Williams & James; Nicholl, Manisty & Co.*

R. M.

LOCKHARTS *v.* BERNARD ROSEN AND COMPANY.

ASTBURY J.

1922

Feb. 21.

[1921. L. 1851.]

Vendor and Purchaser — Title — Leaseholds — Disrepair — Purchasers' Knowledge—Contract to take Assignment subject to Landlord's Consent and to Premises being taken in present Condition—Subsequent Notice to repair—Licence to assign expressly withheld until Notice complied with—Cost of Repairs—Incidence—Specific Performance.

On January 15, 1921, the purchasers having inspected leasehold premises and ascertained their bad state of repair agreed to buy them for 150*l.* and to take an assignment of the lease subject to the landlord's consent being obtained and to the premises being taken in their then present condition. The premises were not assignable without the landlord's licence.

On February 1 the title (subject to the licence being obtained) was accepted and the draft assignment approved.

Two days later the landlord served a formal notice of breaches of covenant and a schedule of dilapidations on the vendors, and intimated that her licence to assign would be withheld until the notice was complied with. The vendors at once forwarded the notice and schedule to the purchasers, informed them of the landlord's intimation, and requested them to do the repairs. The purchasers refused to do any repairs and subsequently repudiated the purchase.

The vendors then did the repairs at a cost of 225*l.*, obtained the licence to assign, and claimed specific performance of the contract on the footing that the 225*l.* and other outgoings since February 1 must be borne by the purchasers:—

Held, that the vendors were entitled to the relief they claimed on the following grounds:—

(*a*) By contracting to take the premises in their then present condition the purchasers had assumed liability for and agreed to indemnify the vendors against the cost of any subsequent repairs.

(*b*) Although the 225*l.* was in a sense part of the costs of making the title, it was an expense for which the purchasers had expressly assumed liability, and they were not entitled to prevent the vendors making a title by repudiating this liability.

(*c*) From the date of the contract the vendors in the circumstances held the premises in their dilapidated condition as trustees for the purchasers with a corresponding right of indemnity against the cost of any subsequent repairs or outgoings.

SPECIFIC PERFORMANCE ACTION.

By an agreement constituted by letters of January 4–15, 1921, the defendant purchasers agreed to buy certain leasehold premises from the plaintiff vendors for 150*l.* and to

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take an assignment of the lease subject to the consent of the superior landlord being obtained and to the premises being taken in their then present condition.

The premises were held under a fifty years' repairing lease expiring June 24, 1936, at a rent of 85*l.*, and were only assignable to a person previously approved in writing by the landlord. The premises were to the knowledge of the purchasers, who inspected them and obtained a surveyor's report on January 11 during the negotiations and before finally entering into the contract, in a bad state of repair.

On January 19, 1921, the vendors' solicitors delivered their abstract of title, and on January 21 the vendors applied to their landlord for a licence to assign the premises to the purchasers. On January 25 the landlord replied requiring inspection before granting the licence, and an order to view was given on January 26.

On January 27 the purchasers' solicitor sent the draft assignment with requisitions asking whether any notice to repair or of breach of covenant had been served, and stating that if so it must be complied with before completion. He also required the vendors to obtain the licence to assign at their own expense.

On January 31 the vendors' solicitors replied, as the fact then was, that no notice to repair or of breach of covenant had been served, and that the licence to assign had already been applied for. They returned the draft assignment approved.

On February 1 the purchasers' solicitor returned the engrossed assignment for the vendors' execution and asked for a statement for completion.

On February 2 the vendors' solicitors replied that they had sent the engrossment for execution, but it would not be possible to complete that week as the vendors would not have a board meeting until the next week, and the licence had not yet been received.

On February 3 the landlord served a notice of breaches of covenant and a schedule of dilapidations on the vendors, requiring them on pain of forfeiture to remedy the breaches

by May 3. She also intimated that her licence to assign would be withheld until the notice was complied with.

On February 4 the vendors forwarded the notice and schedule to the purchasers, informed them of the landlord's intention to withhold the licence until the notice was complied with, and requested them to do the repairs.

On February 7 the purchasers' solicitor wrote to the vendors' solicitors stating that the purchasers were not prepared to do any repairs, and unless the vendors did them he should advise the purchasers to issue a writ for specific performance.

On February 8 he wrote again stating that the purchasers thought that it must have been within the vendors' knowledge when they entered into the negotiations that a schedule of dilapidations would probably be served, and this was not disclosed.

On February 9 the vendors' solicitors replied that the probability of a schedule was not within their clients' knowledge when the terms of sale were arranged, and that no suggestion of the kind was made until after the application for the licence.

On February 10 the purchasers' solicitor wrote declining to proceed with the purchase.

In order to prevent a forfeiture of the lease and obtain the licence to assign the vendors then did the repairs at a cost of 225*l.*, and the licence to assign was granted on June 18. They had also paid 85*l.* for rent and other outgoings since February 1, and might have to spend more before completion.

On June 21 the vendors commenced this action, claiming specific performance on the footing that the 225*l.* costs of complying with the notice and schedule of dilapidations and the rent and other outgoings since February 1 ought to be borne by the purchasers.

The purchasers' main defence was that until the repairs were executed and the licence to assign obtained the vendors could not make a good title, and the purchasers were not bound to perform the agreement with the new terms imposed by the vendors.

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Luxmoore K.C. and *R. H. Hodge* for the vendors. The purchasers having inspected the premises and ascertained their bad state of repair contracted to take them in their then present condition at the price of 150*l.*, which low price was obviously only accepted by reason of the disrepair. By so contracting the purchasers assumed liability for any repairs subsequent to the date of the contract. The fact that the landlord expressly withheld her licence to assign until the scheduled repairs were done, so that the vendors could not make a title until that date, is immaterial on the question of this contractual liability.

Again, from the date of the contract, or at all events from February 1 when, subject to the landlord's licence, the title was accepted and all was ready for completion, the vendors held the premises as trustees for the purchasers: *Lysaght* v. *Edwards* (1); with a corresponding right of indemnity against any liabilities attaching thereto: *Hardoon* v. *Belilios*. (2)

W. F. Swords for the purchasers. The purchasers contracted to buy the premises as they stood subject to the landlord's consent. In other words they waived any objection to title on the ground of existing breaches of the repairing covenants, an objection otherwise open to them within *Barnett* v. *Wheeler*. (3)

They would have taken the premises as they stood, with the risk of a future dilapidation notice, the moment the licence to assign was obtained and the title made. But they did not undertake liability for any repairs done before that date: *In re Highett and Bird's Contract* (4); *In re Taunton Building Society and Roberts's Contract*. (5)

Now owing to the landlord's requirements the vendors could not make a title until the repairs were done, and as they declined liability the purchasers repudiated the purchase. After this repudiation the vendors did the repairs of their own accord, and obtained the licence necessary to complete their title. This licence they were bound to obtain at their

(1) (1876) 2 Ch. D. 499, 506.
(2) [1901] A. C. 118, 123.
(3) (1841) 7 M. & W. 364.
(4) [1902] 2 Ch. 214, 217; [1903] 1 Ch. 287.
(5) [1912] 2 Ch. 381, 383, 385.

own expense even if it cost them 225*l*. They now seek to force an improved property on the purchasers at a greatly enhanced price. That was not the original bargain, and it is not a case for specific performance on either side.

As to the trustees' indemnity point, the vendors never in fact became trustees for the purchasers. They could not become trustees before they became entitled to specific performance of the original contract—i.e., until they had made a title by obtaining the licence to assign on June 18. Before that date, which was long after the purchasers' repudiation, the purchasers could not safely have taken possession, and the premises were at the vendors' risk both as to repairs and other outgoings.

Luxmoore K.C. in reply. *Barnett* v. *Wheeler* (1) and *In re Highett and Bird's Contract* (2) were decided on the footing that there was an express contract to make a good title: see *In re Allen and Driscoll's Contract.* (3) There is nothing of the sort here. The landlord's consent was to be obtained, and the purchasers were to raise no objection in respect of breaches of repairing covenants. That was really a waiver of a strictly good title.

Again, the vendors did not do the repairs of their own accord. They were under a legal liability to do them on pain of forfeiture of the property which they really held for the purchasers. Both under the special terms of their contract, and under their right of indemnity as trustees, they are entitled to be recouped their expenses.

ASTBURY J. [after stating the facts and pointing out that the purchasers obviously knew that the premises were leasehold premises held under a superior landlord, and that the premises inside and outside were in a bad state of repair and holding that they must be taken to have known that by reason of that fact the vendors were agreeing to sell them for a much smaller sum than they otherwise would have accepted, continued:] The purchasers deny their liability

(1) 7 M. & W. 364.
(2) [1902] 2 Ch. 214, 217; [1903] 1 Ch. 287.
(3) [1904] 2 Ch. 226, 231.

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to specific performance of this contract or to payment of this outlay on the repairs.

The vendors have, in addition to the repairs, paid rent and other outgoings on the premises since the date of the contract already amounting to 85*l.*; and they ask for specific performance on the footing that the costs, expenses and payments which they have incurred and made, ought to be borne and paid by the purchasers in addition to the purchase money.

The point in issue is by no means an easy one to determine. There is no express agreement on the vendors' part to make a good title; but, except for such relief in that behalf as must be inferred from the agreement by the purchasers to take the premises in their then present state of repair and condition, the vendors are bound in my judgment under this otherwise open contract to make and show a good title.

They contend, however, that the effect of the agreement was that as from its date they should be under no obligation to spend any further sums on the repair of the premises, but that that burden should be taken over by the purchasers involving a corresponding liability on their part to indemnify the vendors against any such risk or obligation. Now on proceeding to fulfil their duty of obtaining the landlord's licence to assign these premises, and thus carry out their contract with the purchasers, the execution of repairs which were only necessary by reason of the then existing condition of the property and its having, to the purchasers' knowledge, fallen into disrepair, became a term upon which and upon which alone they could carry out their contract, and obtain the licence to assign, and thus show, as they were bound to show, a good title, irrespective of the non-repair.

As from the date of the contract this property in its existing state of disrepair belonged in equity to the purchasers, and the vendors became as from that date trustees for the purchasers to complete the bargain they had made. It is quite true that in one sense the vendors had to expend this sum of 225*l.* in obtaining a title to the property, because they could not assign it without the landlord's consent; but, on the other hand, they expended that money in doing

repairs for which under the express terms of this contract, and as from its date, the purchasers were liable.

From the date of their bargain the purchasers were liable to indemnify the vendors from liability to put the property into any state of repair other than that in which the purchasers agreed to purchase it; and it would not have been open to them after the landlord's notice to repair had been served to say to the plaintiffs: "We will prevent you obtaining the licence to assign which you are bound to obtain in order to carry out your contract, by refusing to take the burden we have agreed to take, but we shall nevertheless hold you liable in damages for breach of contract."

The purchasers relied on a number of authorities which are decisions to the following effect: When a vendor has entered into an express contract to produce a good title, he is bound to do so, although the purchaser at the time of the sale was aware of there having been a previous breach of contract; but where there is no express contract to make a good title, and the purchaser has notice at the date of the contract of a breach of the vendor's obligations under his lease, he cannot rely upon this breach as excusing him from performance. The authorities relied upon are summed up and referred to by Parker J. in *In re Taunton Building Society and Roberts's Contract.* (1)

I think on the whole, that the vendors as trustees for the purchasers have expended moneys which from the date of the contract and under its express terms and the true inference to be drawn therefrom, the purchasers were liable to pay themselves, and to indemnify the vendors therefrom. That being so, the vendors are entitled to specific performance in accordance with their claim.

Solicitors: *Biddle, Thorne, Welsford & Gait; J. E. Holloway-Pike.*

(1) [1912] 2 Ch. 381, 383, 385.

G. R. A.

C. A.
1921
Nov. 4, 7.
1922
Jan. 31.

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[1921. J. 2451.]

Will—Administration—Annuity charged on Real Estate—Express Trust—Arrears of Annuity—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 24, 25, 40—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 2—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10.

By s. 10 of the Real Property Limitation Act, 1874, "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust" :—

Held, that the section did not extend to an annuity charged upon real estate and secured by an express trust where the trustee still remained in possession of the property upon which it was charged.

Testator, who died in 1898, devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion and investment of the proceeds, and directed them out of the income to pay his wife an annuity of 500*l.* a year for her life and subject thereto to stand possessed of the corpus of the fund upon certain trusts for his children. The testator had one child, who became absolutely entitled to the trust fund subject to the annuity. The widow died on January 20, 1908. At her death there were large arrears of the annuity unpaid, the income of the estate never having been sufficient to pay it in full, and no payment having been made out of capital. No payment in respect of the arrears had ever been made nor had any acknowledgment of a right thereto been given. Early in 1921 part of the residuary real estate was sold, and the surviving trustee thereupon presented an originating petition in the Lancaster Palatine Court asking for the determination of the questions: (1.) Whether on the true construction of the will the annuity was charged upon the corpus of the residuary estate; and (2.) if so, whether the estate of the widow was entitled to any and what sum in respect of the arrears of the annuity. The Vice-Chancellor held (1.) that the annuity was a charge upon the corpus; and (2.), following *In re Turner* [1917] 1 Ch. 422, that the arrears of the annuity were statute barred with the exception of a sum of 108*l.* 4*s.* 4*d.*, less income tax, representing the apportioned part of the quarterly payment due to the widow at her death. He accordingly made a declaration that in the events which had happened the sum of 108*l.* 4*s.* 4*d.*, less income tax, was payable to the widow's legal personal representative when constituted, and that subject to such payment the child of the testator was the only person interested in the residuary

estate of the testator, and appointed one of the defendants to represent the widow's estate. That defendant appealed, and by her notice of appeal claimed to be entitled to the arrears of the annuity for the six years immediately preceding the death of the widow :—

Held, that the claim to the arrears of the annuity was not barred by s. 10 of the Real Property Limitation Act, 1874, and that the interest of the son was therefore subject not only to the apportioned part of the last payment of the annuity due to the widow at her death, but also to the full arrears of the annuity. Inasmuch, however, as the appellant had by her notice of appeal confined her claim to the arrears for the six years immediately preceding the death of the widow the order in the present case would be similarly confined.

In re Turner [1917] 1 Ch. 422 and *Hughes* v. *Coles* (1884) 27 Ch. D. 231 overruled.

Decision of Vice-Chancellor of the Palatine Court reversed.

APPEAL from a decision of the Vice-Chancellor of the Lancaster Palatine Court.

J. N. R. Jordison by his will dated February 5, 1892, devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell and convert and invest proceeds in or upon any of the stocks, funds or securities thereby authorized or from time to time authorized by law and out of the income thereof to pay to his wife Selina during her life an annuity of 500*l.* commencing from his death and to be payable by equal quarterly instalments the first payment to be made at the end of three calendar months after his death, she thereout bringing up and maintaining such of his sons as should for the time being be under the age of twenty-one years and such of his daughters as should for the time being be under that age and unmarried, and subject thereto he directed that his trustees should stand possessed of and interested in the capital and income of the said trust funds in trust for all and every his child and children as therein mentioned. He empowered his trustees in their absolute and uncontrolled discretion to postpone the sale calling in or conversion of his residuary real and personal estate or any part thereof (including leaseholds and other property of a terminable or wasting nature) for such time as they should think fit without being answerable for loss.

By a codicil to his will dated December 9, 1896, the testator confirmed the gift of the annuity to his wife, and declared

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that it should be read as if the provision as to maintenance of their children were struck out and omitted.

The testator died on November 2, 1898, and his will and codicil were proved on February 18, 1899.

He left one child only, the defendant Christopher Newton Jordison, who attained the age of twenty-one years on March 23, 1909.

On Jan. 16, 1899, the testator's widow married T. H. Irvine and died intestate on January 20, 1908, leaving her husband surviving. T. H. Irvine subsequently died also intestate. No letters of administration had been taken to either of their estates.

The income of the residuary estate was paid to the testator's widow during her lifetime, but was insufficient to pay the annuity in full. The amount paid to the widow was in all 1327*l.* 10*s.*, and the amount of the annuity in full was 4608*l.* 4*s.* 4*d.* At the death of the widow there were, therefore, arrears of 3280*l.* 14*s.* 4*d.* No portion of the testator's residuary estate was ever set apart as a provision for the annuity under a power to that effect contained in the will. Since the widow's death no payment had been made in respect of the arrears and no acknowledgment of any right thereto had been given.

The surviving trustee had recently sold a large portion of the residuary real estate, and presented an originating petition in the Lancaster Palatine Court for the guidance of the Court in the distribution of the estate. By it he asked the Court to decide two questions—namely, (1.) whether upon the true construction of the testator's will the annuity was charged upon the corpus of the testator's residuary estate, and (2.) if so, whether the estate of Selina Irvine, the annuitant, was entitled to any and what sum in respect of the arrears of the annuity or whether the defendant Christopher Newton Jordison was the only person now interested in the residuary estate of the testator now subject to the trusts of his will and codicil.

The Vice-Chancellor in answer to the first question declared that the annuity was charged on the corpus of the testator's

residuary estate. In answer to the second question he held that he was bound by the decision of Neville J. in *In re Turner* (1), to hold that all claim for arrears was barred by s. 10 of the Real Property Limitation Act, 1874, with the exception of a sum of 108*l.* 1*s.* 4*d.*, representing the apportioned part of the quarterly payment due to the widow at her death. He accordingly declared that in the events which had happened the sum of 108*l.* 1*s.* 4*d.*, less income tax and without interest, was payable to the representative of Selina Irvine when constituted in respect of the arrears of the annuity and that subject to the last payment the defendant Christopher Newton Jordison was the only person now interested in the residuary estate of the testator now subject to the trusts of the will and codicil. And he appointed the defendant Harriet Irvine, the mother of T. H. Irvine, to represent the annuitant's estate.

Harriet Irvine appealed from so much of the order as declared that the claim to the arrears was statute barred, and by her notice of appeal claimed to be entitled to the arrears of the annuity for the six years immediately preceding the death of the annuitant.

The appeal was heard on November 4, 7, 1921.

Manning K.C. and *A. C. Nesbitt* for the appellant. The first question is whether s. 10 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), according to its true construction, has the effect of barring the annuitant's claim in circumstances such as these, and it is submitted that it has not. Sect. 25 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), is still unrepealed, and s. 10 of the Act of 1874, although its language may be wide enough prima facie to do so, cannot have been intended to apply to a case where the trust property still remains vested in and held by the trustee. Its scope ought to be confined to cases where the property has bona fide reached the hands of beneficiaries or other third parties, and it should be taken to mean that in those cases only the fact that the annuity was secured by an

(1) [1917] 1 Ch. 422.

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express trust in its origin should not operate to prevent time from running. The Statutes of Limitation are directed to adverse possession, and here there has never been any adverse possession: the possession of the trustee is the possession of the cestui que trust, and, as between more cestuis que trust than one, is the possession not of the wrongful but of the rightful cestui que trust: *Lister* v. *Pickford.* (1) It is still the law that time can never run as between an express trustee who still has the property and his cestui que trust. Sect. 25, sub-s. 2, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), had affirmed the sanctity of this principle only the year before the Act of 1874 was passed and s. 10 of the latter Act cannot have been intended to abrogate it. Sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), again carefully excepts the case where the property remains in the hands of the trustee from the immunity given by the section. If the more confined interpretation of s. 10 be, as it is submitted, the true one, then there is no statutory bar against the recovery of these arrears. The learned Vice-Chancellor in deciding this case felt himself bound by the decision of Neville J. in *In re Turner* (2), but that case is not binding on this Court, and was, it is submitted, wrongly decided. Not only does it stand alone, but the learned judge does not really deal with the true construction and scope of s. 10. The Statutes of Limitation do not apply where there is no adverse possession. Here the property is still in the hands of the trustee in trust for the beneficiaries and he is asking for the advice of the Court. *Hughes* v. *Coles* (3) and *Ryott* v. *Bentley* (4) do not therefore apply.

[*In re Wenham* (5) was also referred to.]

Secondly, assuming that our contention as to s. 10 is wrong and that the section bears the wide meaning (of which we admit its language to be capable) then it is submitted that the annuity is a continuing charge on rents and profits indefinitely, as an independent charge, so that as regards any part of the arrears which the total accruing income down to

(1) (1865) 34 Beav. 576; 34 L. J. (Ch.) 582.
(2) [1917] 1 Ch. 422.
(3) 27 Ch. D. 231.
(4) [1920] 1 I. R. 321.
(5) [1892] 3 Ch. 59.

six years before these proceedings would have been insufficient to discharge, they are manifestly outside the statute, seeing that the right to take the rents and profits in satisfaction could not be exercised owing to such insufficiency.

[YOUNGER L.J. Are not a charge on corpus and a continuing charge on rents and profits mutually exclusive ?]

In *In re Young* (1) Parker J. appears to have thought that there was no difference between a charge on corpus and a continuing charge on income.

[WARRINGTON L.J. referred to *Hambro* v. *Hambro.* (2)

YOUNGER L.J. referred to *In re Howarth.* (3)]

Thirdly, this is not an "action suit or other proceeding" brought to recover the arrears within s. 10 of the Act of 1874. It is an application by a trustee asking for directions as to how funds in his hands should be dealt with. The position is similar to that obtaining between mortgagor and mortgagee: *In re Lloyd.* (4) That case was explained and distinguished in *In re Hazeldine's Trusts.* (5) It is only where proceedings to enforce the charge upon the trust fund are taken by the annuitant against some person (other than the trustee) that the statute can be invoked at all.

Lastly, in any case a Court of equity in administering a fund rectifies mistaken payments at any date without regard to Statutes of Limitation which are directed to barring the remedy and not the right: *Harris* v. *Harris* (*No.* 2) (6); *In re Robinson.* (7) The Court, in effect, ignores the existence of the statutes in making or directing distribution amongst the various beneficiaries.

H. Mather and *E. Ackroyd* for the respondent C. N. Jordison. It is argued in support of the appeal that s. 10 of the Act of 1874 does not apply in this case. It is submitted however that the words of the section are plain and apply to the recovery of money charged on land no matter in whose hands the land or proceeds of it may be. These are "arrears of

(1) [1912] 2 Ch. 479, 486.
(2) [1894] 2 Ch. 564.
(3) [1909] 2 Ch. 19.
(4) [1903] 1 Ch. 385.
(5) [1908] 1 Ch. 34.
(6) (1861) 29 Beav. 110.
(7) [1911] 1 Ch. 502.

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rent or of interest" within the second part of the section. The joint effect of s. 10 of the Act of 1874 and s. 42 of the Act of 1833 is that these arrears are made irrecoverable after six years. If this annuity is to be regarded as one entire legacy then it is a sum of money charged upon or payable out of land and reference must be made to s. 40 to see the time limited for its recovery.

It does not lie on this respondent to support the decision in *Hughes* v. *Coles* (1) and reliance is not placed upon it. It is sufficient for him to rely on the plain terms of s. 10 of the Act of 1874 itself.

It was also contended that this was a proceeding against a trustee who had property in his hands on which the charge could still operate and that s. 10 therefore had no application. But the section is perfectly general in its terms and contains no such limitation.

Sub-s. 2 of s. 25 of the Judicature Act, 1873, was, it is submitted, inserted in the Act in order to make a distinct alteration in the law as it then existed. In Darby and Bosanquet's Statutes of Limitation, 2nd ed., p. 430, it is stated: "The Judicature Act, 1873, was passed in the year before the Real Property Limitation Act, 1874, but came into operation on the 1st November, 1875, while the Real Property Limitation Act, 1874, did not come into operation till the 1st January, 1879. The Supreme Court of Judicature Act (Ireland) 1877 (40 & 41 Vict. c. 57), was passed three years after the Real Property Limitation Act, 1874, but came into operation before, viz., on the 1st January, 1878. Sect. 28, sub-s. 2, of the Irish Act contains the same provisions as s. 25, sub-s. 2, of the English Act, but contains in addition the following words: 'This provision, however, is not to affect the enactments contained in the tenth section of the Real Property Limitation Act, 1874, when the same shall come into effect' (i.e., 1st January, 1879)."

There is nothing inconsistent between the provisions of the Trustee Act, 1888, and s. 10 of the Act of 1874.

It was further contended that the present application

(1) 27 Ch. D. 231.

was not an "action, suit or other proceeding" within the meaning of s. 10 of the Act of 1874. But it is a proceeding by way of originating petition in the Palatine Court and as such is equivalent to a proceeding by way of originating summons in the High Court for an administration order under Order LV., rr. 3, 4. The case ought therefore to be treated as if a full decree for administration had been made, in which event the residuary legatee would be entitled to insist on the statute being set up as a defence to the claim: *In re Wenham.* (1) The Court ought not to give a statute-barred legatee an advantage to which he would not have been entitled if he had brought an action on his own account.

The authorities dealing with cases between mortgagor and mortgagee have no bearing on this case.

In *In re Turner* (2) Neville J. followed the usual procedure.

[WARRINGTON L.J. I am inclined to agree with you that the present case is an exceptional one, but that is because the testator has made it so.]

It was also contended that the annuity was a continuous charge on the income of the residuary estate, but it is submitted that the charge was equivalent to a charge upon corpus.

On principle and authority it is submitted that the appeal should be dismissed.

E. Ackroyd for the trustee.

Manning K.C. in reply. If the matter had rested on s. 25 of the Act of 1833, there cannot be much doubt that the statute would not have been set up and that the Vice-Chancellor would not have arrived at the conclusion he did.

Knox v. *Kelly* (3) and *Burne* v. *Robinson* (4) were decided on the basis that charges on land were outside s. 25.

Sect. 10 of the Act, of 1874 is really a proviso to s. 25 of the Act of 1833 and was intended to get rid of the protection afforded by s. 40 of that Act, except in the

(1) [1892] 3 Ch. 59.
(2) [1917] 1 Ch. 422.
(3) (1844) 6 Ir. Eq. Rep. 279.
(4) (1839) 1 D. & Wal. 688.

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case of an express trust where the property was retained by the trustee.

In re Turner (1) is the only case where a claim by a cestui que trust has been defeated by the statute.

Cur. adv. vult.

Jan. 31. The following written judgments were delivered :—

LORD STERNDALE M.R. This appeal from the Vice-Chancellor of the County Palatine of Lancaster raises a question under the will of J. N. R. Jordison in these circumstances. [His Lordship stated the facts and continued :] The ground of the decision of the Vice-Chancellor was that the case was governed by the decision of Neville J. in *In re Turner* (1), and that he was bound by that decision to hold that all claim for arrears was barred by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, with the exception of a small sum which became due after the widow's death by reason of the Apportionment Act, 1870. The appeal is not concerned with this small amount, and I do not consider the Vice-Chancellor's reasoning on it. I think the Vice-Chancellor was quite right in considering himself bound by the decision of Neville J., and that he could not consistently with that decision have decided otherwise than he did. We are, however, not bound by that decision, and before us it was contended that it was wrong and should be overruled. Some slight attempt was made to distinguish it, but it was hardly contended seriously that there was any real distinction.

The grounds of the appeal were two : one an important and difficult point of substance, and one a point of form and of much less importance. The first point, I think, may be stated thus : That the trustee was here in a position of holding enough of the proceeds of sale to satisfy the arrears of annuity upon an express trust for the representatives of the annuitant, and that s. 10 of the Real Property Limitation Act, 1874, has no application to a claim upon a trustee in

(1) [1917] 1 Ch. 422.

such a case, but is applicable only to proceedings by the annuitant to enforce the charge upon the trust fund, that is to say, the land or proceeds thereof when in the hands of some one other than the trustee. The claim against a trustee holding money on an express trust was said to be governed by s. 25, sub-s. 2, of the Supreme Court of Judicature Act, 1873, which, in accordance with the old rules of equity, enacted that: "No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." On the other hand it was contended that the words of s. 10 of the Real Property Limitation Act, 1874, are quite plain and apply to all proceedings to recover money charged on land, no matter in whose hands the land or proceeds may be. This is, no doubt, a difficult question on which text writers hold different opinions, and on which the only direct authority in circumstances like those alleged in this case—namely, where the fund was in the hands of the trustee—is that of Neville J. above mentioned.

The first point to be decided is whether the trustee holds the proceeds of sale now in his hands on an express trust for the annuitant, including in that expression her representative, and Mrs. Irvine was appointed in that capacity by the Vice-Chancellor. I think he clearly does. He took the residuary estate upon trust to pay the annuity primarily out of income, but by the construction of the will the annuity was charged upon the corpus in the event which happened of the deficiency of the income. The result of this is that when the corpus is realized and comes into his hands he holds it on an express trust, first, to pay the annuity, and, subject to that payment, to hand over the balance to the son exactly as if that fund had been in his hands at the testator's death, and was given to him to hold on the trusts contained in the will: see *Ward* v. *Arch.* (1) The difficulty in this case arises from the fact that there are two express trusts on which the trustee holds the fund, first, to pay the annuity, and secondly, subject

(1) (1842) 12 Sim. 472.

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thereto, to hand over the balance to the son, and that the two cestuis que trust do not agree as to the amount payable to them respectively. If the arrears of the annuity are paid in full, there is so much less to be paid to the son, who contends that owing to the operation of the Statute of Limitations they are not to be paid in full; in fact, that they are not to be paid at all, as all arrears are barred by the statute. The contest is, therefore, between the two cestuis que trust, and the trustee comes to the Court for directions.

I have already read s. 25 of the Judicature Act, 1873, and pointed out that it does not make new law, but only declares the law as then existing in the Court of Chancery. According to that section there is no limitation of time within which a claim on a trustee holding on an express trust must be made, but it was contended by the respondents, and decided by the Vice-Chancellor in accordance with the decision in *In re Turner* (1), that such a limitation is imposed by the Real Property Limitations Act, 1874, s. 10, which is in these terms: "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." It will be observed, and will be found to be important, that the wording varies from that used in the Judicature Act, 1873, in that the later Act speaks of an annuity charged upon land and secured by an express trust, while the words used in the earlier Act are "held upon an express trust." Still it was contended that the words of the later Act are wide enough to cover the present case, and looking at the words alone, apart from any other circumstances, I think there is great force in the contention. It is true that to adopt it would produce some strange results, for example, an express trustee holding a fund charged upon land would be

(1) [1917] 1 Ch. 422.

protected by the statute, while an express trustee holding a fund not charged on land would not, and other difficulties would be produced which it is not necessary to mention. I do not attach very much importance to these difficulties. Parliament, like individuals, often uses language without fully appreciating at the time the full result of it. I think the only safe method of construction is to attach the natural meaning to the words used, regardless of the consequences. Applying this method, I had at one time formed the opinion that the section applied to this case. I have come to the conclusion that that opinion was wrong. It is, I think, clear that it is right to look at the circumstances in which words are used, and that those circumstances may show that they are used in a more limited sense than would appear apart from them. I have come to the conclusion that looking at the law as it stood at the time when the Real Property Limitation Act, 1874, was passed, and the current of authorities which established that law, the words used in s. 10 must be so limited.

I do not intend to discuss the cases at length. They are fully examined in the judgment which will be delivered by Younger L.J., and I only propose to state what is, in my opinion, the result of them. In order to do that, it is necessary to look at the Statute of Limitations existing before 1874. That statute is the Real Property Limitation Act, 1833. Sects. 25 and 40 are the relevant sections, and I therefore read them: and I will also read s. 24. Sect. 24 says: "No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity." Sect. 25 says: "Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through

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him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." Sect. 40 says: "No action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given." It will be noticed that s. 25, dealing with the case of an express trust, uses the words "vested in," which are equivalent to the words of s. 25 of the Judicature Act, 1873, "held on," while s. 40 used the words "charged on land" without using, as s. 10 of the Real Property Limitation Act, 1874, does, the words "secured by an express trust," and it is the meaning of the combined expressions "charged on land" and "secured by an express trust" which has to be sought, and is, I think, found in the current of authorities between 1833 and 1874.

The Courts had to deal with two classes of cases, the cases in which the property or its proceeds remained in the trustee's hands and was held by him in trust for one or more cestuis que trust, and secondly, cases in which the property or its proceeds was in the hands of persons other than the trustee, but was secured to the cestuis que trust when it came into the trustee's hands, usually by a term. The distinction is clearly

pointed out in *Watson* v. *Saul.* (1) In the first class of cases there is no difference of opinion in the authorities. It was consistently held in all of them that the section governing such cases was s. 25 and not s. 40. This was held in the case of annuities in *Ward* v. *Arch* (2), and *Knight* v. *Bowyer* (3) established that this rule governed the relations of the cestuis que trust and not only those of the trustees and the cestuis que trust.

In the second class of cases there was considerable difference of opinion, notably in the dissent of Lord Wensleydale in *Burrowes* v. *Gore.* (4) The state of the law, however, was that these cases also fell within s. 25 and not within s. 40 of the Real Property Limitation Act, 1833. The ground for so holding was that though the land or proceeds was or were not in the hands of the trustee, the fund was secured to the cestui que trust when it came to the trustee's hands by an express trust. Here, therefore, is to be found the origin of the expression used in the Real Property Limitation Act, 1874, "charged upon land and secured by an express trust." When that statute is looked at, I think it is plain that s. 10 was not part of the original frame of the Act. Down to the end of s. 9 it is an Act to be read with the Act of 1833 curtailing the lines of limitation and substituting s. 8 for s. 40 of the former Act, and s. 9 seems to be a conclusion summing up the effect of the Act. Then comes s. 10 dealing with a particular matter apart from the Act of 1833. Possibly it was inserted when the Bill was in Parliament, but it may have been added by the draftsman after the frame of the Act had been first decided. When and where it was inserted is immaterial, but looking at the state of the authorities, the unanimity of decision upon the first class of cases, the difference of opinion upon the second class with the reasons given for that difference, and the aptness of the language to express the condition of things which was the foundation of that difference, I think the conclusion is irresistible that s. 10 does not apply to the first

(1) (1859) 1 Giff. 188.
(2) 12 Sim. 472.
(3) (1858) 2 De G. & J. 421, 441.
(4) (1858) 6 H. L. C. 907.

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class of cases at all, and does not alter the law in that class of cases, that is, where the land or its proceeds is in the hands of the trustee upon an express trust, but only applies where it is in the hands of some one else, but is secured by an express trust when it gets into the hands of the trustee. In other words, an examination of the circumstances existing at the passing of the Act indicates the true meaning of the language used and imposes a limitation upon the wide meaning of the words of s. 10 contended for by the respondents.

I think, therefore, that s. 10 of the Real Property Limitation Act, 1874, does not apply to this case at all, which is one of the first class of cases to which I have referred, and that the appeal should be allowed, and a declaration made accordingly.

If this interpretation of s. 10 be adopted, the relevant Acts, the Real Property Limitation Act, 1833, the Judicature Act, 1873, s. 25, the Real Property Limitation Act, 1874, s. 10, and the Trustee Act, 1888, all work harmoniously, while if the other interpretation be adopted there are great difficulties in reconciling the different provisions contained in them.

I think it right to say that I have dealt with this case on the footing on which it was argued before us by both sides—that is to say, that the fund on which the annuity was charged consisted of land only, and that no question arose of its being charged on personalty or on a mixed fund. I have therefore not considered the results that might follow in such a case.

The second point taken by the appellant was that the question of limitation by statute could only be raised when proceedings had been in fact taken against the trustee to compel him to pay the annuity, and should not be taken in proceedings such as those now before the Court. In the view I take of the main point this becomes immaterial, but as at present advised I do not agree with the appellant's contention on this point. When a trustee comes to the Court for guidance in the discharge of his duty between the conflicting claims of two cestuis que trust, I think it is open to the Court to consider what would be the respective rights of the cestuis que trust if they tried to enforce them by

proceedings against the trustee, and that it is not necessary to require such proceedings to be actually taken before deciding the point.

I think the appeal should be allowed and a declaration made in the terms of the notice of appeal: "That the interest of such respondent is subject not only to the payment of the said sum of 108*l.* 4*s.* 4*d.* but also to the payment to the legal personal representative of the testator's widow the annuitant Selina Irvine of the full arrears of her annuity of 500*l.* under the said will during the six years previous to her death on January 20, 1908." It may be that the appellant does not ask for so much as the annuitant is entitled to, but she was asked during the argument if she wished to amend, and declined to do so, because an amendment would have involved an amendment of the respondent's contention, and she preferred to take the decision of the Court on the notice of appeal as it stood.

The appeal therefore will be allowed, and the costs will be as stated in the judgment of Warrington L.J.

WARRINGTON L.J. James Jordison, who died in the year 1898, devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion and investment of the proceeds and directed them out of the income to pay his wife an annuity of 500*l.* a year for her life and subject thereto to stand possessed of the corpus of the fund upon certain trusts for his children.

It has been held on the construction of the will—and on this point there is no appeal—that the annuity was a charge upon the corpus. The testator had one child who became absolutely entitled to the trust fund subject to the annuity. The widow died on January 20, 1908. At her death, there were large arrears of the annuity unpaid, the income of the estate never having been sufficient to pay it in full, and no payment having been made out of capital. No payment in respect of the arrears has ever been made, nor has any acknowledgment of a right thereto been given. Early in 1921 a part of the real estate was sold and the trustee

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thereupon presented an originating petition asking for the determination of (1.) the question of the construction above referred to, and (2.) whether the estate of the widow was entitled to any and what sum in respect of the arrears of the said annuity. The learned Vice-Chancellor after answering the question of construction in the sense above mentioned, made a declaration that in the events which have happened a sum of 108*l.* 4*s.* 4*d.* less income tax (being in fact the quarterly payment of the annuity due to the widow at her death) was payable to her legal personal representative when constituted, and that subject to such payment the child of the testator was the only person interested in the residuary estate of the testator.

The ground of the decision was that all arrears of the annuity being charged on real estate were barred by statute (except the 108*l.* 4*s.* 4*d.*, as to which there was no person entitled to sue until a legal personal representative was appointed), and that having regard to s. 10 of the Real Property Limitation Act, 1874, the fact that the trustees were directed to pay the annuity did not take them out of the statute. In so deciding the learned judge followed the decision of Neville J. in *In re Turner* (1), and we are asked to overrule this decision. It is not disputed that if the remedy is barred as to the real estate it is barred as to the personal estate also: *Sutton* v. *Sutton.* (2)

The question really turns on the effect of s. 10 of the Act of 1874. That section which comes at the very end of the Act is in the following terms: [His Lordship read the section and continued:] Sect. 8, which takes the place of s. 40 of the Act of 1833, substitutes twelve years for twenty years as the period of limitation in the case of any sum of money charged upon land, and s. 9, in effect, provides that the provisions of the Act of 1833, except those contained in the sections thereinafter mentioned including s. 40, should remain in full force and should be construed together with the Act of 1874 and should take effect as if the provisions thereinbefore contained were substituted for the provisions contained

(1) [1917] 1 Ch. 422. (2) (1882) 22 Ch. D. 511.

in the sections specified which were thereby repealed. Then comes s. 10, in my opinion a fresh and independent enactment dealing with the subject matter mentioned in it: "any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust."

In the present case there is no charge on the land independently of the express trust to pay the annuity. The trustee has two duties to perform—first to pay the annuity out of the income and in case of deficiency out of the capital and subject thereto, that is, after payment of the annuity in full, to pay the fund to the testator's child. By construction this amounts to a charge on corpus in the sense that if the income proves insufficient it is the duty of the trustee to raise and pay the amount of the deficiency out of the corpus of the fund.

It is contended by the appellant that the section has not upon its true construction any application to such a case as the present, that is to say, a case in which land is vested in a trustee upon trust to raise and pay a sum of money to one person and subject thereto for another, but that its application is confined to another class of cases altogether which I think may be thus described: "Where land vested in one person is charged with a sum of money in favour of another and the means of raising the amount of the charge, whether in the form of a term or otherwise, and the duty of paying such amount to the person entitled thereto when raised are entrusted to a third person as trustee."

If the section bears the wide construction given to it by the Vice-Chancellor and by the judgment of Neville J., which he followed, it would have this remarkable result, that (the trustee being bound if required by the cestui que trust entitled to the residue of the fund to plead the statute) he would be entitled and bound, in effect, to plead his own continued breach of trust as a defence to the claim of one cestui que trust, though he has in his hands enough money to satisfy the claim. In order to solve this question I think it is material to consider the position of the authorities under the Act of 1833 at the time of the enactment of the section in question

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with a view to determining, if possible, what was the mischief which the section was intended to remedy. As to the first class of cases—that to which the present case belongs—there never was any real controversy that either s. 40 of the Act of 1833 had no application, or, if it had of itself such an application, this result was prevented by the operation of s. 25.

The view that s. 40 had no application to such a case was clearly stated by Stuart V.-C. in *Watson* v. *Saul.* (1) He says : " The trustee to whom land is conveyed upon trust to raise and pay a sum of money out of it, without any beneficial interest to himself in the money or the land, holds the land and the money arising from the sale of the land on an express trust," and, lower down : " The 40th section of the statute is inapplicable to cases of express trust." This judgment was delivered on January 24, 1859.

There had a few months previously been delivered in the Court of Appeal in Chancery, the judgment of Turner L.J. in *Knight* v. *Bowyer.* (2) In that case, according to the construction put upon the documents by the Lord Justice, land was vested in a trustee on trust to raise and pay certain annuities and subject thereto for the grantor to the trustee. It was contended by the grantor or those claiming under him that the annuities were barred by the statute, but the learned Lord Justice held that this was not so, but that the annuities were protected by the general rule of equity which he held to be embodied in s. 25, and he further expressly held that this protection could be made available not only as against the trustee but also as against another cestui que trust. This case was not referred to in *Watson* v. *Saul* (3), and there are thus two independent decisions on the same point.

Finally, by s. 25, sub-s. 2, of the Judicature Act, 1873, what had previously been a principle of equity was made a rule of law in the following terms : " No claim of a cestui que trust against his trustee for any property held on an express trust . . . . shall be held to be barred by any Statute of Limitations."

(1) 1 Giff. 188, 197, 199. (2) 2 De G. & J. 421.
(3) 1 Giff. 188.

The correctness of the decisions in *Watson* v. *Saul* (1) and *Knight* v. *Bowyer* (2) has never been questioned, and no controversy as to them had arisen at the time of the passing of the Act of 1874.

I now turn to the second class of cases. The decisions in respect of this class have provoked some controversy. In *Young* v. *Lord Waterpark* (3) and in *Cox* v. *Dolman* (4), certain sums charged on land were secured by a term vested in a trustee—not the owner of the land—upon certain trusts for raising the sums so charged. In each case it was held that there being a subsisting term under which the termor was entitled in spite of lapse of time to enter into possession and raise the amount of the charge the Statute of Limitations had no application, inasmuch as the trustee having raised the money would be bound to pay it to his cestui que trust, whatever the lapse of time.

The case of *Burrowes* v. *Gore* (5) was one of a similar nature, but I cite it first for the purpose of quoting a short passage from the opinion of Lord St. Leonards, and secondly, because Lord Wensleydale dissented from the decision of the majority, showing that this class of cases had given rise to some controversy. Lord St. Leonards says this: "If, therefore, this had been an express trust as regards land itself, a trust of so much land as would represent 1500*l.* or 2000*l.*, then the Statute of Limitations would have directly saved that trust under s. 25, which saves express trusts as to land. . . . . There is always a difficulty in applying the statute when you come to trusts, not with regard to land itself, but with regard to charges upon land; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same as to charges in either case. The old rule prevails: I think it is perfectly settled that the effect of a charge of this nature, to be raised by express trust, falls within the saving as much as if the express trust had been applied not to charges upon the land but to the land itself."

(1) 1 Giff. 188, 197, 199.
(2) 2 De G. & J. 421.
(3) (1845) 15 L. J. (Ch.) 63.
(4) (1852) 2 D. M. & G. 592.
(5) 6 H. L. C. 907, 961.

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Lord Wensleydale as I have said dissented. I do not read the whole of his judgment on the point; it is enough to quote a short passage (1): "It seems to me, I own, that (Robert Burrowes) as being entitled to an interest in the estate charged with the term of 300 years, he has a right to set up the statute and to say that the person who attempts to have the money raised out of the estate is barred by the Statute of Limitations." The difference between Lord St. Leonards and Lord Wensleydale, therefore, was this, that Lord Wensleydale thought that the proposition which Lord St. Leonards regarded as expressing a well-settled rule ought not to prevail.

The doctrine adopted in these cases was subsequently extended. In *Lewis* v. *Duncombe* (No. 2) (2) it was applied to an ordinary annuity deed, which purported to secure the annuity by the grant of a term to raise the annuity. In *Round* v. *Bell* (3) Lord Romilly expressed the view that it would apply to an ordinary mortgage with a trust to secure the money. In *Shaw* v. *Johnson* (4) the doctrine was applied to the case of an ordinary mortgage with an agreement to assign to a trustee an existing outstanding term upon trust to secure the mortgage debt. Kindersley V.-C. decided that case on the authority of *Cox* v. *Dolman* (5), considering himself bound thereby whatever might have been his opinion had the matter been res integra.

I think I have said enough to show that at the time of the passing of the Act of 1874 there had been a series of decisions not commanding universal acceptance giving the benefit of the rules of equity regulating the relations of trustee and cestui que trust to persons who it might well be thought ought to be excluded therefrom. Taking this circumstance into account I turn to the Act and I find that the words are "any sum of money charged upon or payable out of any land or rent and secured by an express trust." That is to say, there are two qualifications of the sum of money referred to—

(1) 6 H. L. C. 967.
(2) (1861) 29 Beav. 175.
(3) (1861) 30 Beav. 121.
(4) (1861) 1 Dr. & Sm. 412.
(5) 2 D. M. & G. 592.

it is to be charged on land and to be secured by an express trust. These words exactly fit the second class of cases above referred to, as to which the controversy I have mentioned had arisen, and I think it is more reasonable to confine the operation of the section to that class rather than so to construe it as to make it cover a class of cases as to which their right to be unaffected by the Statute of Limitations had never been questioned. In *In re Turner* (1) it is to be observed that Neville J. really only discusses the question whether an annuity payable out of the proceeds of a mixed fund is charged upon land and treats the application of s. 10 of the Act of 1874 as being in that case a matter of course ; it would appear that the point on which I think the case turns was raised in argument, but it does not seem to have been worked out quite in the way the matter is dealt with in this judgment and those of my brethren. It is clear that *In re Turner* (1) cannot stand with our present decision and must be treated as overruled.

I think the same must be said of *Hughes* v. *Coles*. (2)

The appeal must be allowed and a declaration made as asked by the notice of appeal. This will give the appellants arrears for six years only prior to the death of the annuitant ; it seems to me they are in law entitled to the whole of the arrears, but they will get only what they ask for.

The costs should, in my opinion, be paid out of the residuary estate, as they were in the Court below, except that the trustee only ought to have his costs as between solicitor and client.

YOUNGER L.J. The joint effect of the will and codicil of this testator was that his real estate and the residue of his personal estate were devised and bequeathed to his trustees on trust for sale, and upon further trust after payment out of the proceeds of his debts and the legacies bequeathed by his will for investment and, out of the income of the investments, in the will referred to as "the trust fund" upon trust to pay to his widow Selina during her life an annuity

(1) [1917] 1 Ch. 422. (2) 27 Ch. D. 231.

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of 500*l.* by equal quarterly payments with a direction that "subject thereto"—these are his own words—his trustees should stand possessed of and interested in the capital and income of the trust fund in trust for his child or children, and if more than one in equal shares as in the will mentioned. The testator empowered his trustees to carry on for such period as they might think fit his trade, or business, of a soda-water manufacturer, and he declared that all profits and interest which might accrue to his estate from the carrying on of that business, and from the employment in it of his personal estate and the proceeds of sale of his real estate, or any part thereof "after the annuity of 500*l.* hereinbefore bequeathed to my said wife has been paid and satisfied shall be added to and considered as part of my residuary estate." The will contained the usual power to the trustees in their discretion to postpone the sale and conversion of the real and personal estate or any part thereof for such time as they should think fit, with a consequential declaration that until sale or conversion the rents and profits and income arising from such of the residuary real and personal estate as should for the time being remain unsold or unconverted should be paid or applied by the trustees as if they were the dividends, interest and income arising from the investment of the proceeds of sale.

I shall have, in what follows, to refer again more than once to these provisions, or to some of them; but I have stated them now that I might, at the outset, direct attention to two of their outstanding characteristics, neither of which has, so far as I can find, been hitherto observed upon in these proceedings, but one, or both of which should, as it would seem to me, before the claim of the widow's estate can be properly rejected out of hand, receive more consideration than has yet been extended to them.

It will, in the first place, be noticed that the fund upon which the widow's annuity is in terms charged, is a fund arising from the conversion into money of the testator's residuary real and personal estate. So far as that annuity is charged on corpus it is charged only on the investments

representing the net proceeds of sale resulting from the conversion directed by the testator.

It will, in the second place, be observed that prior to actual conversion the residuary trust estate is a mixed fund of realty and personalty.

Now the surviving trustee has, in his petition, given no particulars as to the composition or origin of the net residuary estate—that is of the estate after the testator's debts and legacies had been raised and paid out of it. Nor has he condescended upon any particulars as to the way in which these debts and legacies were raised and paid. What he has done is to set out in the schedule to his petition the particulars of the testator's real and personal estate at the death—particulars, it must be agreed, with no relevance to the first question raised by the petition, and of little, if any, assistance on the second with which, on this appeal, we are alone concerned.

These particulars, however, do very clearly indicate that the property in personalty belonging to the testator when he died was quite substantial in amount. Three questions at once suggest themselves. First: If it be the fact that the net residue which has apparently remained in the hands of the surviving trustee throughout, is as to any part of it personal estate, how is it suggested that as to some part at least of the widow's claim there is any bar imposed by any Statute of Limitations? Secondly: If personalty has been applied out of its due proportion in discharging outgoings to be borne rateably only with the realty, will not the annuitant's estate be entitled now to an adjustment to that extent out of the realty in the trustee's hands? Thirdly: Is not the question at least worthy of consideration whether the effect of the imperative trust for conversion contained in the will is not to exclude altogether any application to the case of any time limitation, even although that trust for conversion is accompanied by a power to postpone which has in fact been exercised?

None of these questions has been touched upon by the learned Vice-Chancellor, the argument before him apparently,

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as certainly before us, proceeding upon the assumption that the entire estate charged with payment of the widow's annuity was all through to be regarded as a fund of unconverted realty. In these circumstances I feel necessarily constrained in what follows to make the same assumption.

But I shall refer again to these matters after I have concluded what, upon that assumption, I have to say.

The testator died on November 2, 1898; his widow married again on January 16, 1899, and died on January 20, 1908. During her life her annuity was paid only out of the free income of the trust fund. That did not suffice to pay it in full. The arrears at her death amounted to 3286*l.* 14*s.* 4*d.* No payment in respect of these arrears has since been made to any person representing her estate. There is, as I have already indicated, no statement made as to the manner in which subsequent income has been applied by the surviving trustee. The Court, upon the petition, has been left to assume that the entire corpus of the "trust fund" still remains in his hands, it being with reference to an annuity so charged upon a trust fund so circumstanced that in his petition the surviving trustee propounded the two questions which have been set forth in the judgment of my Lord.

The Vice-Chancellor has, with a qualification as to the second, answered both questions in the affirmative. An appeal has been brought only in respect of his answer to the second.

And it is not surprising that there should have been no cross-appeal from the Vice-Chancellor's answer to the first question. On the authorities, familiar I should have thought to every lawyer, that question was almost too clear for argument, and why the plain rights of the widow and of her estate should for so long have been unrecognized has not been explained. Whatever be the explanation of it, the delay is indeed unfortunate, seeing that as a result of a neglect so long continued the question has at length come to be no less than this: whether the originally undoubted rights of the widow and of her estate are not now entirely

extinguished. The Vice-Chancellor has, with a small reservation, held that they are. In so doing he followed a decision of Neville J. to the like effect. The question for this Court, untrammelled by that authority, as the Vice-Chancellor was not, is whether that is the true position. And the question is one of wide general interest from whatever point of view it be regarded.

It is not, for instance, in debate that the result reached, if the question must be answered as the Vice-Chancellor has answered it, is not only quite anomalous but is subversive of accepted principles in relation to express trusts recognized and applied in Courts of equity for centuries, and, on the so-called fusion of law and equity in 1873, declared then by the Legislature itself and without qualification to be law in all Courts. It is recognized that in relation to every other kind of property than an annuity from land which is held by trustees on trust for its payment—the present case—or a legacy secured by an express trust, these principles remain applicable. That they have been superseded in these instances, results, so it was said by Mr. Mather in his very able and concise argument for the respondent, from the wording of s. 10 of the Real Property Limitation Act, 1874. And it cannot be suggested that any colour for any such a supersession is to be found in any other quarter, legislative or judicial. The question, accordingly, for this Court is, whether such is the intent and necessary effect of that section.

I state the question in these narrow terms because they are, I think, the only proper terms in which to state it. The Legislature is not, by the use of other than the clearest words, to be taken to have subverted in any statute fundamental principles whether of law or of equity. It is a matter of judicial obligation to the Legislature itself, that the Court, in construing a statute, shall make that presumption.

But it will not, in my view, in the present case, be necessary for the Court to make any presumptions. An examination of the law on this subject, as it stood in 1874 when the section in question was passed, will, I believe, show that its words, on their perfectly reasonable and natural construction, were

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neither intended to have, nor do they involve, any such consequence as has been here contended for. Such an examination is long overdue. Unless the results of it are borne in mind, the point and significance of the language employed in s. 10 may be missed, until, as now, they stand at risk of being lost altogether.

The Act of 1874, which is intituled An Act for the further limitation of actions and suits relating to real property, was in effect an Act for the amendment of the Real Property Limitation Act of 1833. That earlier Act, by ss. 24 and 25, gave statutory effect to rules and principles long recognized in Courts of equity. I cannot do better than cite, for a description of the object and effect of these sections, the following passage from the judgment of Turner L.J. in *Knight* v. *Bowyer* (1) where, after reading them and observing that s. 24, if there had been no proviso embodied in s. 25, would have extended to express trusts, he proceeds as follows: "It is argued for the appellants, that this proviso applies only as between the cestui que trust and the trustee, and not as between cestui que trusts, although under an express trust, where some have received to the exclusion of others; but the contrast between the 24th and 25th sections points, I think, to the opposite conclusion. The case between the cestuis que trust would have fallen within the 24th section if uncontrolled by the proviso. That section furnishes the general rule as to equitable estates, and the proviso being general, it is reasonable, I think, so to construe it as to except, where there is an express trust, all the cases which would otherwise have fallen within the general rule." It is of extreme importance as I read the cases under the Act and trace their development to bear this statement of Turner L.J. in mind. Not only was his view nowhere qualified; it was in all cases in which the principle was applicable strictly applied. It will be found, I think, that the mischief disclosed in the working of the Act of 1833 by its application to cases to which, in view of ss. 40 and 42, it was not presumably properly addressed was one of the

(1) 2 De G. & J. 421, 441.

contributing causes which led to the inclusion in the Act of 1874 of that s. 10 with which we are now concerned.

A few years after the Act of 1833 had been passed, questions arose as to the relation in which s. 25, so construed, stood to these two other sections of the statute—to s. 40, which sets a limitation of twenty years to any action, suit or proceeding to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy—and to s. 42, which sets a limitation of six years to any distress action or suit for any arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy.

The question arose in two quite separate classes of cases. The first class—which is that with which we have now to do—comprised cases where the land was held by a trustee upon an express trust for payment of rent—an annuity being a rent within the meaning of the statute—and the second class comprised cases where the rent or annuity charged was payable to a trustee for the annuitant or—the more common case—where the annuity was secured by a trust term, but where in each case the land itself charged with the annuity was held by, or was in possession of, an owner who was in no sense either an express trustee for the annuitant, or a co-cestui que trust with him. And the course of legal decision in the two classes of cases was very different. With regard to the first class, in which, as I have said, the present case is included, the judicial view, with one doubtful but possible exception (*Lord St. John* v. *Boughton* (1); see *Watson* v. *Saul* (2), was uniform, and never criticised or dissented from. That was that neither s. 40 nor s. 42 had in these cases any effect whatever upon the express provisions of s. 25. An account of the judicial position with reference to this class of case will be found in the judgment of Stuart V.-C. in *Watson* v. *Saul* (3), a case of land treated as being held by trustees upon an express trust for payment of annuities. The whole

(1) (1838) 9 Sim. 219. (2) 1 Giff. 188, 194–196.
(3) 1 Giff. 188, 197, 198.

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judgment is interesting. I can only cite the following as specially relevant to the present discussion : " The reason why the 40th section of the statute contained a special enactment as to charges on land was, because doubts had been entertained as to the effect of lapse of time, in the case of charges on land as distinguished from express trusts. It seems to me that the provisions of the 40th section do not apply, and were never intended to apply to cases of express trusts. Lord Eldon, in the case of *King* v. *Denison* (1), noticed the distinction between mere charges and express trusts, which is the foundation on which the 40th section rests. In one sense any beneficial owner of land on which money is charged, whether devisee or grantee, is a trustee, though a trustee only by construction of law, because he has himself a beneficial interest in the land; but the trustee to whom land is conveyed upon trust to raise and pay a sum of money out of it, without any beneficial interest to himself in the money or the land, holds the land and the money arising from the sale of the land on an express trust. . . . . Some of the cases cited during the argument show that some judges have overlooked the distinction between a charge on land and an express trust—a distinction which both Lord Cottenham and Lord Plunket kept in view. In *Phillipo* v. *Munnings* (2) Lord Cottenham treated the suit as that of a cestui que trust, to recover the trust fund. It was contended that the 40th section of the statute was a bar to the claim, but Lord Cottenham held that the claim was not within the 40th section of the statute. He pointed out that the fund had been separated from the general assets of the testator, and therefore remained in the trustee's hands impressed with the trust created by the will. It had become subject to an express trust in favour of the cestui que trust, and there being an express fiduciary relation between the parties, the 40th section of the statute did not apply. It follows, therefore, from this review of the authorities, that the 40th section of the statute is inapplicable to cases of express trust."

Now this judgment is very instructive for more purposes

(1) (1813) 1 V. & B. 260. (2) (1837) 2 My. & Cr. 309.

than one. The case before the Vice-Chancellor was one of our first class. The property, as here, was in the hands of a trustee having himself no beneficial interest in it: it was held by him only as a trustee. The Vice-Chancellor shows that to such a case s. 40 of the statute had no application; s. 25 alone governed it. The judgment also quite clearly establishes that where land charged with an annuity is in the beneficial ownership of another, not himself an express trustee for the annuitant, s. 40 and not s. 25 applies to the case. The Vice-Chancellor, however, does not deal with the intermediate case, although I think the terms of his judgment go far to indicate how he would have dealt with it had it occurred to him to discuss it—namely, the case in which the annuity was charged on land in the beneficial ownership of another not himself an express trustee for the annuitant, but where the annuity was payable not to the annuitant himself but to an express trustee for him. That is the case with reference to which, as will later be seen, difficulties did arise: in no other case was there any doubt or difficulty at all.

I pause here again to observe that the present is of the class of case with which so far I have been dealing. The trust fund here is held—is still held—by the trustee on trust to pay his annuity and "subject to the full and complete payment thereof"—for that is the meaning of the words "subject thereto" in this connection: see *Birch* v. *Sherratt* (1), the fund is held upon trust for the testator's children. In other words the trust fund is held primarily on trust to pay the annuity: subject thereto it is held on trust for the children. It is held for both purposes: there is no question of either interest—or perhaps more accurately there is no question of one interest more than the other being "secured" by the express trust. To such an interest as that of the annuitant in this case there never was, as I have already said, any doubt or question that the provisions of s. 25 of the Act of 1833 applied irrespective altogether of those of s. 40, and that too both as against the trustee and as against any other cestui que trust in possession of the lands charged.

(1) (1867) L. R. 2 Ch. 644, 648.

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I need refer to no more than three typical cases in support of that statement. I choose two of them, because of their similarity to this case, and because they show that in circumstances like the present the holder of the property out of which the annuity proceeds is an express trustee for the annuitant.

The first is *Ward* v. *Arch* (1), a case differing from the present only in this, that the facts there are not on the point of the trustees' possession so strong as they are here. The second is *Gough* v. *Bult* (2), stated to be indistinguishable from *Ward* v. *Arch*. (1)

The third case is *Francis* v. *Grover* (3), where Wigram V.-C. puts the point very tersely : " If there be a devise to trustees in trust to pay an annuity, and no purchase for value intervening, the 25th section will govern the case."

I come now to the second class of cases above referred to—the cases to which I shall end by holding that the provisions of s. 10 are exclusively directed. I state this now in the interests of clearness.

These cases had a very different judicial history. But, although faced with criticism never withdrawn, accepted in one quarter, only in deference to authority, extended in another, with an admission that thereby the object of s. 42 of the statute was defeated, the result must, I think, at length be taken to have been reached, at least in Courts of first instance, that an annuity charged upon land, and secured by an express trust, remained operative without reference to time even as against a legal owner in possession of the land who was neither an express trustee for the annuitant, nor a co-cestui que trust with him. And all this, in face of criticism to which it is difficult to find an answer.

I propose to justify that summary of the situation by examining, I hope compendiously, the cases which appear to me to bear it out. It is only, as I have already indicated, by accurately ascertaining the position in which, in 1874,

(1) 12 Sim. 472. (2) (1848) 16 Sim. 323.
(3) (1845) 5 Hare, 39, 50.

as interpreted by judicial decision, the Act of 1833 in these respects stood that the true purpose and effect of s. 10 of the statute of 1874 can be discovered.

The earliest line of authority on this branch of the subject was all in favour of the ascendancy in such cases as we are now considering of ss. 40 and 42 of the statute. And here I may observe parenthetically that it seems always to have been accepted that cases under each of these sections stand upon the same footing; as, indeed, they are in terms comprised together in s. 10 of the Act of 1874. This first stage of development is best represented by several cases in Ireland in which it was held that an annuity charged upon land in possession of a third party, or a legacy similarly charged, and in each case payable to a trustee for the annuitant or legatee was within s. 42 or s. 40 of the Act, and not within s. 25. I will specially cite two of them. The first, *Burne* v. *Robinson* (1), was the case of a rentcharge secured by a trust term. "On the words of the statute," says Lord Plunket L.C., "the 25th section does not relate to the interest upon charges, but to the right of the party to the lands or the charges themselves. There would also be considerable difficulty in showing that the defendant here" (the tenant in fee simple in possession) "could be considered as deriving under a trustee within the provisions of that section, even if it had any application to the case."

The second Irish case is *Knox* v. *Kelly* (2), a case where lands were devised charged with the payment of a legacy, and although this, in the opinion of the Master of the Rolls, involved an express trust for its payment as between the executor and the legatee, the case was held to be within s. 40, and not within s. 25.

The origin of the opposite view is traceable to two English authorities: *Young* v. *Lord Waterpark* (3) and *Cox* v. *Dolman*. (4) These were cases, the one of portions and the other of annuities, with in each instance trust terms to secure them. In the first case the trust term was assumed to be

(1) 1 D. & Wal. 688, 698.
(2) 6 Ir. Eq. Rep. 279.
(3) 15 L. J. (Ch.) 63.
(4) 2 D. M. & G. 592.

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still in the trustees, and with due regard to the statute unexhausted as to some of its purposes; and in the other it was admitted so to be. And the only decision in either case was—and here the Court was merely following the rule which I have above set forth from Turner L.J.'s judgment in *Knight* v. *Bowyer* (1)—that when once possession was taken by the trustees, the termors under their still subsisting legal title, they would then having regard to s. 25 of the statute hold the term for the purpose of satisfying all its trusts without reference to time and not merely those which, even if under the statute, were not out of time. Neither of these cases went further than this nor as I read them was either of them intended to go further than I have stated.

This, in *Lord Waterpark's Case* (2) is, I think, shown by the following passage from Lord Lyndhurst's judgment. After saying that it was contended that as all the younger children had been entitled to their portions since 1804, their claim was barred by s. 40, the Lord Chancellor continued: "But in this case the term of 500 years is still in the trustees, and there is nothing, therefore, in the statute to prevent them from raising the residue (of the portions) in manner directed by the settlement. The money, when so raised, will be held by them as trustees, for the purposes of the settlement, that is, for the use and benefit of the parties entitled under the settlement, and therefore, as to the two seventh shares, for the plaintiff, the personal representative of two of the younger children. To a case of this nature between the trustees and the cestuis que trust, the statute has no application. The trustee holds not adversely to his cestui que trust, but for him and for his use and benefit."

Even more express is the judgment of Lord St. Leonards in the second case of *Cox* v. *Dolman* (3), a case to recover arrears of annuities long overdue if s. 40 were applicable. "The point," says the Lord Chancellor, "is clearly settled on the authority of *Young* v. *Lord Waterpark* (2), and on principle

(1) 2 De G. & J. 421. (2) 15 L. J. (Ch.) 63, 64.
(3) 2 D. M. & G. 592, 597.

there is no distinction between that case and the present. The legal estate here remains undisturbed, and the parties who have that estate may at once recover possession; as long as that right remains in them, the claim which is asserted by the plaintiff [an annuitant] is not barred by the statute. Whenever the trustees, having the right, execute the trust by taking possession, the right of the cestui que trust immediately accrues, and she is entitled to the full benefit of the trust. Here the only question is, whether there can be an independent bar to prevent these trustees from raising the arrears when it is admitted that there is an undisputed trust. . . . . There is no ground whatever to impeach the decision of *Young* v. *Lord Waterpark*. (1) The report in that case, however, does not distinctly show that there was a subsisting term on which the trustees could have recovered. As that is admitted [here], all difficulty as to the propriety of that decision vanishes."

Now to my mind, this last statement of Lord St. Leonards very clearly shows that the decision both in *Young* v. *Lord Waterpark* (1) and in *Cox* v. *Dolman* (2) was rested exclusively upon the ground that the term, as a legal interest, was subsisting and unexhausted and enforceable as such against the owner in possession. It is true, and this, I think, was in Lord Wensleydale's eyes the vice of these decisions, that in their result the mere accident that the legal title of the trustee remained enforceable as to some of the trust purposes enabled cestuis que trust whose claims otherwise were statute barred to have their title restored through the possession of the trustee subsequently taken. But none of the cases suggested that if all of the trusts of the term had, apart from any trust, become statute barred the trustee would have had any right at all to claim possession. That position or its equivalent was only reached at a later stage. That the trustee would have had no such right may, I think, be taken to have always been the view of Lord St. Leonards. Not only is it implicit in his judgment in *Cox* v. *Dolman* (2): it had been foreshadowed also in 1845 in his judgment in the

(1) 15 L. J. (Ch.) 63. (2) 2 D. M. & G. 592, 597.

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Commissioners of Charitable Donations v. *Wybrants* (1) where, dealing with the statute of 1833, after holding that s. 25 applied to the case then before him, Lord St. Leonards proceeds thus: "It is not a case in which the annuities were given to trustees for the charities, and the estate itself, subject to the annuities, was given to other persons beneficially. If that case should arise, it may be found more difficult to relieve the charities in this Court, where time has operated against the trustees of the annuities as a legal bar." Nor is the conclusion that Lord St. Leonards at no time resolved that difficulty in favour of the cestuis que trust really affected by some expressions of his in *Burrowes* v. *Gore* (2), although it must, I agree, be conceded that, if not read, as I apprehend they should be, in connection with the facts of the case then under consideration his observations already referred to by the Lord Justice might appear to be quite general.

It is convenient now to refer to *Burrowes* v. *Gore* (3), because it is in this case that the protest of Lord Wensleydale against carrying the cases even so far as they had been carried in *Cox* v. *Dolman* (4) is to be found.

In *Burrowes* v. *Gore* (3) equally with *Cox* v. *Dolman* (4) all the noble and learned Lords who concurred in the view that time in that case was no bar held also that the legal term there outstanding was still unexhausted, subsisting and effective as such. This appears from Lord Chelmsford's speech at p. 944, from Lord Cranworth's at p. 945 and from Lord St. Leonards' own speech at p. 961.

Lord Wensleydale's views expressed in this case (5) lie in my judgment, as will hereafter appear, at the root of the provisions of s. 10 of the Act of 1874. Lord Wensleydale says this: "It seems to me, I own, that, as being entitled to an interest in the estate charged with the term of 300 years, he (the owner in possession) has a right to set up the statute and to say that the person who attempts to have the money raised out of the estate is barred by the Statute of Limitations.

(1) (1845) 2 J. & Lat. 182, 198.
(2) 6 H. L. C. 907, 961.
(3) 6 H. L. C. 907.
(4) 2 D. M. & G. 592.
(5) 6 H. L. C. 907, 967, 968.

. . . . To go by steps; supposing a bond to have been given, altogether unconnected with any marriage settlement or trust, and afterwards to have been assigned by the obligor to some trustee upon certain trusts, and notice to have been given by the assignee to the obligor of the assignment, and of the trusts of it, I take it to be clear that no suit could be maintained upon the bond after 20 years from the period of payment, unless the case was taken out of the statute by one of the modes pointed out by it. There would be no trust created as between the obligor and the cestui que trusts. The obligor would not have to see to the payment of their shares to the cestui que trusts. Payment to the obligee would be his discharge, although the obligor might render himself liable for the breach of trust of the trustee, if he took a release from him without any payment, or paid the debt in such a way to him that the cestui que trusts could never have the benefit of it. But the simple omission of the obligor to pay, and of the trustee to cause the bond to be sued upon, within the statutory time, could never amount to a breach of trust. Suppose then that the bond had been originally given to a trustee in a marriage settlement, to which the obligor was no party, but that he had, on the creation of the bond, knowledge of the trust of the settlement, would the case be different? The money when recovered or received in the bond would be held by the obligee in trust, but is never held by the obligor. All his obligation is to pay the sum secured to the trustees, not to hold it himself in trust for any one; and the non-payment of the money and the omission of the trustee to sue for it for twenty years, would not be a breach of trust in which the obligor concurred, and therefore in respect of which he would be still liable, any more in the second supposed case than in the first."

Notwithstanding these views, however, of so great an authority, directed against the decisions even so far as they had gone, this second class of case became even further extended in Courts of first instance. As an example, in *Shaw* v. *Johnson* (1), Kindersley V.-C. extended them to a

(1) 1 Dr. & Sm. 412.

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trust term to secure a mortgage, the mortgagor remaining in possession. His decision is, however, for present purposes illuminating, for his judgment indicates very clearly that had he not been as he, I think mistakenly, supposed he was, bound by *Cox* v. *Dolman* (1), he would have decided it differently. "The next question is this" he says:—(2) "suppose there is a term of years assigned to a trustee expressly in trust for the mortgagee to secure the mortgage money and interest, what is the effect of that term? That question depends upon the 25th section of the Limitation Act. And whatever might be the construction I should put upon it if the matter were res integra, it appears to me that *Cox* v. *Dolman* (1) established that where a term is created for the express purpose of securing the mortgage money and interest, the effect is that the Limitation Act does not operate, because there is an express trust."

Perhaps, however, although as much for the argument in it of Mr. Roundell Palmer as he then was, as for the judgment of Sir John Romilly M.R., the most striking of the subsequent cases is that of *Lewis* v. *Duncombe* (*No.* 2). (3) There an annuity was secured on real estate by means of a term vested in trustees on trust to raise and pay the arrears and hold the surplus of the proceeds in trust for the grantor of the annuity. It was held by the Master of the Rolls that the case came within s. 25 of the statute, and that the annuitant's right to the arrears was not limited to six years under s. 42 as against the grantor and his subsequent incumbrancers. Now it is true to say that there the grantor as well as the annuitant was in terms a cestui que trust under the trustee. But the grantor and not the trustee had remained in possession and the case was argued by Mr. Roundell Palmer who had also been counsel for the plaintiff in *Cox* v. *Dolman* (1), as if this were in no way the substance of the matter. His argument is most striking, because of its strong similarity, even in phrase, to Lord Wensleydale's words already quoted. Mr. Palmer was counsel in *Burrowes* v. *Gore* (4), but that case

(1) 2 D. M. & G. 592.
(2) 1 Dr. & Sm. 412, 415.
(3) 29 Beav. 175.
(4) 6 H. L. C. 907.

was neither cited nor referred to in *Lewis* v. *Duncombe* (*No.* 2). (1) More important still for present purposes is the fact that he there uses words closely similar to the very terms afterwards used in s. 10 of the Act of 1874, to which we are soon coming. Mr. Palmer's words as reported are these (2): "The case is not governed by *Cox* v. *Dolman* (3) which was one of trust and not of charge. . . . . It is now attempted to extend the doctrine of *Cox* v. *Dolman* (3) to cases of mortgages and annuities. Here the estate is conveyed to a nominee of the annuitant, with no other substantive object than to secure the annuity, and, on principle, what difference can it make, as regards the question of time running in favour of the owner of the estate, whether it is conveyed to the annuitant himself or to a trustee for him? They stand in the same position, and the question is the same, it is one between the grantor and grantee of the annuity, and if, as regards the grantor, the annuity is barred, so is the trust to secure it. . . . . Most of the transactions by way of security are equitable, and the result of the plaintiff's contention would be, to take all such cases out of the operation of the statute, and by the mere introduction of the word 'trust' to defeat the whole policy of the statute." Sir John Romilly nevertheless decided the case in the plaintiff's favour. He held that the trust excluded the statute. It is true, as I have said, there was there also a trust stated for the obligor, but as I read his judgment, the decision of the Master of the Rolls would not have been different had that stated trust been omitted. Dealing, however, with Mr. Palmer's argument, Sir John Romilly says this (4), and his words are important, as throwing light on the purpose of s. 10 subsequently passed: "I am told, that if this be so determined, it defeats the object of the 42nd section of the first statute, and that every person who purchases an annuity, in this way, will take care that the deed is so prepared as to create a trust similar to this, and so evade the consequences of the enactment. I am unable to deny this consequence, but it is a

(1) 29 Beav. 175.
(2) 29 Beav. 181, 182, 184.
(3) 2 D. M. & G. 592.
(4) 29 Beav. 175, 192.

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case of common occurrence, in our law, that efforts are, from time to time, successfully made by persons to evade the effect of a statute, and of this numerous instances might be cited from the time of the Statute of Uses down to the present time. In fact, however, this is not, as I believe, a new form of deed introduced for the purpose of evading the enactment contained in the 42nd section of 3 & 4 Will. 4, c. 27, but a form of deed in frequent use before that Act passed. However this may be, the result is the same."

The last case of all to which it is necessary to refer is that of *Round* v. *Bell* (1), also before Sir John Romilly, where the decision was that where money is secured by an ordinary mortgage by covenant and bond, the mortgagor in a suit to foreclose can only recover six years' arrears of interest, but that the case is different where there is a trust to secure it. There the Master of the Rolls said : "The point to be decided in this case is one which has been very much discussed of late years, and on which it has been supposed, that the later decisions are very conflicting. I am of opinion that is not the result, and I adhere to my decision in *Lewis* v. *Duncombe* (*No.* 2). (2) . . . . I am of opinion that the principle which I explained in *Lewis* v. *Duncombe* (*No.* 2) (2) governs this case, which is this, where there is a simple mortgage with a bond and covenant, you can only recover six years' arrears of interest as against the estate, but where there is a trust to secure the mortgage and interest, or where the estate is vested in a trustee to raise a sum of money and interest, the statute does not apply, and you can recover interest to the extent allowed by the statute 3 & 4 Will. 4, c. 42."

This decision, while it clearly reaffirms Sir John Romilly's previous views, introduces unfortunately a further confusion, because the application of s. 25 in the case of *Lewis* v. *Duncombe* (*No.* 2) (2) effected no such limitation as twenty years. It excluded the element of time altogether. This case, therefore, is perhaps only useful to show how slender

(1) 30 Beav. 121, 122, 123. (2) 29 Beav. 175.

was the authority on which such decisions as those in *Lewis* v. *Duncombe* (*No.* 2) (1) and *Shaw* v. *Johnson* (2) had to rest.

Enough however has now, I think, been said to establish the proposition already here propounded, that in 1874 when the Act of that year was passed there was authority accepted at least in Courts of first instance to the effect that an express trust, whether supported or not by a term, to secure an annuity charged upon the lands of and in possession of another who was not a trustee for the annuitant sufficed, although the arrears were otherwise barred by s. 40, to preserve the arrears for all time even in a case in which the raising of the annuity was the sole object of the trust no less than of the term to secure it. It was also the law in all Courts, including the House of Lords, that when trustees of a term to secure (inter alia) an annuity, of itself statute barred, having the right so to do, executed the trust by taking possession of the land, the right of the cestui que trust, the annuitant, accrued immediately under s. 25 and he was restored to the full benefit of the trust. It, however, is also true, that each of these results remained the subject of the strong adverse criticism to which I have called attention.

Now it is convenient here to point out that the view of these matters taken by Lord Wensleydale and those who thought with him in no way operated to relieve the trustee as between himself and the annuitant in such a case as we are now considering from any of the obligations of an express trustee in respect of any actual receipt of money or neglect of duty: see *Burrowes* v. *Gore.* (3) The view embodied in Lord Wensleydale's judgment and in Mr. Palmer's argument in *Lewis* v. *Duncombe* (*No.* 2) (1) only was that where the owner in possession of the estate was in substance a debtor of the annuitant by reason of his estate being charged with payment of the annuity the mere fact that it was secured by an express trust with or without a term to support it in no way extended the liability of the estate or its owner beyond what would

(1) 29 Beav. 175. (2) 1 Dr. & Sm. 412.
(3) 6 H. L. C. 907, 934.

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have been its liability under s. 40 if the charge had been one in favour of the annuitant direct.

Now it is matter of history that in 1873 and 1874 the shortening of the then existing periods of limitation was in the air. Lord Selborne as Lord Chancellor had introduced a Bill for that purpose in 1873. The Act of 1874 was Lord Cairns' measure introduced by him into Parliament after he had succeeded to the Great Seal. It is, I think, manifest from the frame of the Act as passed that s. 10 was no part of its original purpose. It seems to have been added after the scheme of the Act had been fully developed. I need not again read the section. The question is whether it did more than further amend the Act of 1833 by introducing into its working a provision which would for the future exclude the possibility of decisions like *Shaw* v. *Johnson* (1); *Lewis* v. *Duncombe* (*No.* 2) (2); *Round* v. *Bell* (3); *Young* v. *Lord Waterpark* (4); *Cox* v. *Dolman* (5); and *Burrowes* v. *Gore* (6); the decisions of which as I have shown had been the subject of severe destructive criticism, as unduly affecting the operation of ss. 40 and 42 of the statute in cases indistinguishable in substance from those to which the sections were plainly and directly applicable. In my judgment that was the sole purpose of the section. If so, it has no application at all to such a case as that with which we are concerned in this appeal, a case in which by the testator's will no relation in connection with the trust fund is constituted except that of express trustee on the one hand, and cestuis que trust on the other. It seems to me that this is the necessary result of the language used in the section. The line of cases in each of the two classes which I have examined—the cases particularly of the second class—indicate with, to my mind, striking cogency, the meaning to be attached to the emphatic words of the section "and secured by express trust." These are the very words used by Mr. Roundell Palmer in his argument in *Lewis* v. *Duncombe* (*No.* 2). (2) They are used in my

(1) 1 Dr. & Sm. 412.
(2) 29 Beav. 175.
(3) 30 Beav. 121.
(4) 15 L. J. (Ch.) 63.
(5) 2 D. M. & G. 592.
(6) 6 H. L. C. 907.

judgment in contradistinction to the words "held on an express trust," and they are employed, as it seems to me, to indicate that the section is only applicable to cases where, to take the instance of an annuity, you have three parties, first, the owner, devisee or obligor and his charged estate, secondly, the trustee, and thirdly, the annuitant, for whom he is trustee, and that it has no relation at all to a case where you have only a trustee holding the property on the one hand, and the annuitant and other cestuis que trust of the trustee on the other—cases in which, as I have already said, there is no question of the one beneficiary more than the others being "secured" by an express trust, the true position being that the entire property is held by the trustee upon the different trusts expressed with reference thereto. It is provided by s. 9 of the Act of 1874 that the Act of 1833 shall be construed together with the Act of 1874, and I cannot doubt that in so construing the two statutes the true place of s. 10 of the Act of 1874 is immediately after s. 25 of the Act of 1833, it being in effect a proviso to that section, constituting to the extent I have stated a qualification of its effect as expounded by Turner L.J. in the passage from his judgment in *Knight* v. *Bowyer* (1) already cited; with the result that by virtue of the new section the Act of 1833 would in relation to ss. 40 and 42 henceforth work as Lord Wensleydale and those who thought with him had contended, that it was always intended it should work. Under this construction of the section I desire to repeat, the mutual rights and obligations of the annuitant cestui que trust and his express trustee remain untouched, except only to this extent, that the annuitant is, to take the case of arrears of an annuity, no longer entitled to shelter himself behind any legal claim of his trustee against the charged estate in respect of these arrears, in any case in which, these arrears, had they been charged in his favour directly, would have been barred under s. 40. In other words, the doctrine of express trusts in relation to the arrears of an annuity secured by a trust term was modified only to this extent, that neither the trustee nor

(1) 2 De G. & J. 421.

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the annuitant could claim, as the possession of the annuitant, a possession obtained by the trustee after the annuitant's claim to arrears had, apart from such possession, become barred by s. 40.

The justification for this construction of the new section is not difficult to find. There never was any plausible reason why an annuitant who was essentially a creditor of the ultimate obligor should in respect of time be given the advantages of a cestui que trust merely because the annuity was payable not to himself directly but to a trustee for him. On the other hand there would appear to be no reason at all why a cestui que trust entitled as such to an annuity out of real estate held upon trust for its payment to him should, any more than if he had, say, been equitable tenant for life of the same property, be relegated to the position of a creditor in respect of time for the assertion of his rights, when in relation to property of every kind not touched by the section and held upon trust for him he is allowed for every purpose to remain as he truly is, a cestui que trust entitled to the benefit of an express trust in his favour. The alternative construction of the section, however—the construction involved in the principle adopted by the judgment appealed from—draws no distinction between the position of the annuitant in the two cases, and applies the provisions of the section equally to both. It extends the section, that is to say, to a case like the present, where the trustee has all along been in possession of the trust property out of which the annuity issues. On this reading of it the section destroys as between the trustee and the annuitant the relation of trust in respect to any arrear so soon as the time has expired within which the annuitant could have claimed payment from his trustee, had he been a debtor and had there been no trust. The consequences are little short of revolutionary. The result in the present case would be that all claim to the arrears of her annuity on the part of the widow's estate was extinguished six years after her death, notwithstanding the fact that all the time there had been in the hands of the trustee trust property of a value far more than enough to satisfy all arrears in full.

The further consequence would be that automatically at the end of the six years these arrears, or the trust property freed from them, would become the property of the residuary cestui que trust, although apart from this reading of the section and with reference to any kind of property held on the same trusts other than that included in s. 10, the possession of the trustee would throughout have been the possession of all his cestuis que trust. More extraordinary still would be the result where an annuity is secured by a trust term created solely for the purpose of raising it. In such a case on this view of the section, a trustee having raised or received the annuity, but for some reason having neglected or omitted to account for it to the annuitant would, after six years, find all claim of the annuitant to any prior arrears barred by the section; and he, not being in any sense a trustee for the owner of the estate from whom the arrears had been received, would find all claim on the latter's part to recover them back as money had and received extinguished at the same moment. In other words, the trustee would be put in a position to appropriate these arrears to his own use without liability to account. This, indeed, Mr. Mather admitted. Now there is of course no limit to the powers of the Legislature. It will however be agreed, as I have already insisted, that a construction is not lightly to be placed upon an Act of Parliament one result of which would be, in one state of facts, to transfer the trust property of one cestui que trust to the pocket of another, and, in an alternative, but equally probable state of facts, to enable the trustee to appropriate trust property to himself. The Legislature is not to be presumed to have destroyed in relation to the property to which the section extends the fundamental principles of common honesty on which the relations of cestui que trust to trustee, and of cestui que trust to cestui que trust had for centuries been based.

Nor was 1874 a likely period for such an attempt to be made. Only the year before, by s. 25, sub-s. 2, of the Judicature Act, 1873, it had been definitely enacted that "No claim of a cestui que trust against his trustee for any property

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held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." To my mind it is inconceivable that without comment or warning so complete a reversal of this principle should have been enacted in the following year, to say nothing of the fact that in the Trustee Act of 1888 in which a time limit was for the first time imposed upon certain claims in respect of breaches of trust the Legislature by the generality of the words employed showed the most complete unconsciousness that any such change in the relations between any express trustee and any cestui que trust had at any time been made by itself.

But no such change had in fact been made. For myself, I am content with the statement of the relation between the two sections, which alone amongst the text-books I have been able to consult is to be found in the author's own words, at p. 1008 of the 9th ed. of Lewin on Trusts: "The first-mentioned enactment (i.e., s. 25, sub-s. 2, of the Judicature Act, 1873) applies as between trustee and cestui que trust, while the 37 & 38 Vict. c. 57, s. 10, applies as between the land charged (though secured by way of trust) and the persons entitled to the charge." The correctness of this statement is, in my judgment, in no way weakened by the fact that in the 9th edition an editorial hand later than the author's has purported to fortify it by a reference to two cases which do not seem to be in point.

In my judgment, therefore, this s. 10 has no reference whatever to such a case as that with which, on this appeal, we are concerned, even assuming, as I am assuming, that the trust fund has throughout been a fund of unconverted realty.

I would add a single word with reference to the allusion made to s. 10 of this Act of 1874, in s. 28, sub-s. 2, of the Supreme Court of Judicature Act (Ireland), 1877—the section of the Irish Act corresponding to s. 25, sub-s. 2, of the English Act already cited. The Irish Act, although passed after s. 10, came into operation before it, and s. 28, sub-s. 2, contains this addition: "This provision, however, is not to affect

the enactments contained in the tenth section of the Real Property Limitation Act, 1874, when the same shall come into effect." Now, as I have already pointed out, there is one respect in which upon the construction I have placed upon the section, the provisions of s. 28, sub-s. 2, are affected. The words of the section are sufficiently satisfied by that consideration. Be this however as it may, what, so far as we in England are concerned, is more important, is that in the Act of 1874 there is no reference amending or touching s. 25 of the Judicature Act of 1873, nor is there in the Trustee Act of 1888 any reference to s. 10. This is intelligible enough if the influence of that section in relation to trusts is confined within the limits I have ventured to assign to it. But it is surely not to be supposed that the same silence would have been observed in either statute if the effect of the section upon trusts had been so extensive as that attributed to it by the decision which the learned Vice-Chancellor followed, to which I must now advert. That was the case of *In re Turner* (1), decided in 1917 by Neville J. I think the learned Vice-Chancellor had no option but to follow that decision, for there is no material distinction between the facts in the two cases. Neville J.'s judgment, however, is not binding on us, and I cannot myself agree with it. The point which I have laboured in this judgment was put in argument to the learned judge, but possibly because the cases cited were chosen, two from the second of our two classes: *Cox* v. *Dolman* (2) and *Burrowes* v. *Gore* (3), and one from the first: *Watson* v. *Saul* (4), without the essential distinction between them being pointed out, the judgment of the learned judge does not expressly deal with the point at all, while the three cases cited by him as showing the position before the Act indicate that he had not appreciated the distinction between them. It was conceded here that in no other case than *In re Turner* (1)—I doubt whether the concession is true of *Hughes* v. *Coles* (5), but that decision

(1) [1917] 1 Ch. 422.
(2) 2 D. M. & G. 592.
(3) 6 H. L. C. 907.
(4) 1 Giff. 188.
(5) 27 Ch. D. 231.

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is not now in point—that on no other occasion has any question, arising in a case under our first class, been reported as having come before the Courts since the Act of 1874 came into force. There is accordingly no authority other than *In re Turner* (1), which stands in the way of the conclusion at which I have arrived. In my judgment, *In re Turner* (1) cannot stand. It should now, I think, be definitely overruled.

In the view I take of the case upon the assumption on which I have hitherto been proceeding it becomes unnecessary for me to express any opinion upon the two questions which at the commencement of this judgment I reserved for further consideration. I only wish to say that, as at present advised, I am not convinced by the reasoning by which in argument it was sought to dispose of them in *In re Turner* (1); and on the conversion point I should wish, before rejecting it, to consider very carefully such cases as *In re Heathcote* (2); *In re Horsnaill* (3); and *In re Kipping* (4)—particularly the judgment of Buckley L.J.

But I need not pursue this matter further. I state these points: I express no opinion upon them. This judgment has already far exceeded due limits, excusable only by the necessity, as I see it, of endeavouring even now to recapture and restate the purpose of s. 10, which with unfortunate results has been quite overlaid in intermediate commentary judicial and otherwise.

In my judgment on the first ground, this appeal should be allowed, and the order of the Vice-Chancellor be varied by declaring in effect (the Master of the Rolls has already announced the exact terms) that the appellant, as representing the estate of the widow, is entitled to receive out of the proceeds of sale in the petitioner's hands not only the sum allowed by the Vice-Chancellor, but, in addition, the arrears of the annuity over the six years preceding the widow's death. The sum is so limited, not because there is any time limit in respect of them, but because only six years' arrears

(1) [1917] 1 Ch. 422.
(2) (1887) 58 L. T. 43.
(3) [1909] 1 Ch. 631, 635.
(4) [1914] 1 Ch. 62, 67.

are asked for by the notice of the appeal and the appellant's counsel, for good reason during the hearing before us, elected not to have that notice amended.

Appeal allowed.

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Solicitors: *Bridgman & Co.; Pritchard, Englefield & Co., for J. H. Glover, Watson, Buckley & Blackwood, Liverpool.*

W. I. C.

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[1920. F. 1068.]

Trade Union—Trade Dispute—Refusal to Miners of Safety Lamps—Check-weigher—Interference with Workmen—Depriving Workmen of or hindering them in use of Tools—Conspiracy, and Protection of Property Act, 1875 (38 & 39 *Vict. c.* 86), *s.* 7—*Trade Disputes Act,* 1906 (6 *Edw.* 7, *c.* 47), *s.* 3.

By s. 7 of the Conspiracy, and Protection of Property Act, 1875, "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,— . . . . 3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; . . . . shall, on conviction . . . . be liable either to pay a penalty . . . . or to be imprisoned. . . . . "

By s. 3 of the Trade Disputes Act, 1906: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills":—

Held, that s. 7 of the Act of 1875 did not prohibit any acts which could not be made the subject of civil proceedings by a person whose rights were thereby interfered or attempted to be interfered with, and, therefore, that conduct in respect of which (by reason of the provisions of s. 3 of the Act of 1906) no civil action could be brought was not within the prohibition of s. 7 of the Act of 1875, and could not be made the subject of an action for damages on the ground that the conduct complained of was criminal.

Where, therefore, there is an existing arrangement between a recognized trade union and an employers' association that non-unionists shall not be employed in the mines of a district, and at one of those mines the officials of the recognized trade union in pursuance of the settled policy of their union advise or instruct and thereby procure

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a workman charged with giving out safety lamps not to let miners who are members of an unregistered union have their lamps, or when they obtain from some of these miners the lamps issued to them without employing violence or threats of violence, their action, if taken for the purpose of preserving peace in the mine by preventing non-unionists from working there, is done in contemplation of a trade dispute within s. 3 of the Trade Disputes Act, 1906, and does not constitute a breach of s. 7 of the Conspiracy, and Protection of Property Act, 1875.

Ward, Lock & Co. v. *Operative Printers' Assistants' Society* (1906) 22 Times L. R. 327, 329 applied.

Decision of Sargant J. ante p. 140 affirmed.

APPEAL from a decision of Sargant J. (1)

The facts, which are fully set out in the report of the case in the Court below, were shortly stated by the Master of the Rolls in his judgment as follows :—

"The plaintiffs were members of the Wednesfield and District Miners' Association (hereafter called the 'Wednesfield Union'), a body which is not recognized by or affiliated to the Miners' Federation of Great Britain. The defendants are members of one or other of two unions—the Cannock Union and the Pelsall Miners' Association—both of which are so affiliated. The great bulk of the men working at the colliery which is concerned in this matter are also members of these two unions. The defendant Kibble was the checkweigher appointed by the miners working at the colliery, and, I think, was also an official of the union. The defendant Sambrook was a delegate of these unions; they were therefore persons of considerable influence amongst the workers. Before the circumstances with which this case is concerned happened an agreement had been made between the mineowner and the Miners' Federation that only union labour was to be employed in the colliery, and for this purpose members of the Wednesfield Union were considered non-unionists. The union had been established or promoted in a great measure by a man of the name of Cartwright who had quarrelled with the Miners' Federation, and there was a considerable feeling amongst the other men antagonistic to Cartwright and his union. I think the learned judge was warranted in finding that there was a well-grounded anticipation that if the

(1) Ante, p. 140.

members of the Wednesfield Union were allowed to work the other miners would refuse to work, and that there would be a stoppage at the pit. I think he was also warranted in finding that the defendants were anxious to avoid such a stoppage if possible, and that what they did was done with the object of preventing the stoppage, although they certainly also wished, as they frankly admitted, by the steps which they took to induce the plaintiffs to join one or other of the affiliated unions. The steps they took were these. Before the miners can go down to work in the pit each of them must have a safety lamp, and without such a lamp they cannot work, and are not allowed to go down the pit. These lamps are kept in a lamp room under the charge of a lamp man, who is a servant of the mineowner, and not in any way under the control of either of the defendants. Each miner, as I understand it, is provided with a ticket or check corresponding in number or some distinctive mark to a lamp, and when the lamps are to be given out a queue is formed and each man is given a lamp in exchange for a check. The defendants, in order to prevent the plaintiffs from working, took two steps, one step being taken in some cases, and the other step being taken in other cases according to the circumstances. First they told the lamp man not to give out lamps to the plaintiffs. I use the word "told" as a neutral word. The learned judge has found that what they did was to advise the lamp man not to give out lamps to the plaintiffs. I do not think the word to describe what they did is very material. It was found, and indeed admitted, that no violence, no threats and no intimidation were used, and in that case, as the defendants had no control over the lamp man, what they did would amount to no more than advice or request. Secondly, when lamps were given out they again without violence or threats or intimidation asked the plaintiffs to give them back, and the plaintiffs did so. The plaintiffs then brought an action against the defendants for an injunction and damages alleging a combination or conspiracy to compel or induce a breach of contract which was stated to be the breach by the plaintiffs by ceasing to work for the

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mineowner, without giving the fourteen days' notice required by the terms under which they were working. I think in a later stage of the argument some breach by the mineowner in not giving a lamp was alleged. Sargant J. held that apart from any inducing of a breach of contract no cause of action was disclosed in the case, but that, assuming such a cause of action were shown, the Court could not entertain it by reason of s. 3 of the Trade Disputes Act, 1906. (1) "

The plaintiffs appealed. The appeal was heard on January 19, 23, 1922.

Disturnal K.C. and *R. A. Willes* for the appellants. By s. 32 of the Coal Mines Act, 1911, no lamp or light other than a locked safety lamp shall be used in certain places in coal mines; and by s. 33 no safety lamp shall be used unless it is provided by the owner of the mine and is of a type approved by the Secretary of State. Such lamps are clearly "tools," to deprive a workman of which is a penal offence within s. 7 of the Conspiracy, and Protection of Property Act, 1875. (2)

(1) Trade Disputes Act, 1906, s. 3: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

(2) Conspiracy, and Protection of Property Act, 1875, s. 7: "Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or,
2. Persistently follows such other person about from place to place; or,
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or,
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or,
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall on conviction thereof by a court of summary jurisdiction, or on indictment as herein-after mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour. . . . ."

The object of the respondents may have been to force the appellants to join the Cannock Union, but that does not bring them within the protection of s. 3 of the Trade Disputes Act, 1906. There was no "trade dispute" here within the definition in s. 5, sub-s. 3, of that Act.

The appellants do not challenge the judgment of Sargant J. upon s. 13 of the Coal Mines Regulation Act, 1887.

[WARRINGTON L.J. Did the defendants deprive the plaintiffs of their tools? It was the lamp man who refused to let them have their lamps.]

The defendants by their interference prevented the plaintiffs from getting their tools and that is actionable: Conspiracy, and Protection of Property Act, 1875, s. 7, sub-s. 3. Where something is done which is an offence under the Act of 1875, then s. 3 of the Trade Disputes Act, 1906, does not apply. It is submitted that the case comes within s. 7. Sargant J. held that there must be some violence to bring it within the section. The Act does not so provide and it is not to be implied: s. 7, sub-s. 1.

What the defendant Kibble did was to counsel the lamp man not to issue the lamps. The element of violence is not necessarily involved in the deprivation of the tools. Sargant J. was wrong in so holding. The object of the defendants was no doubt to compel these men to join the union, but what was done was "with a view" to compel the plaintiffs to abstain from doing a lawful act: *Lyons & Sons* v. *Wilkins*. (1) There is here a statutory prohibition and the Court has jurisdiction to make the order asked for: *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.* (2) If a particular damage ensues from the breach of a statutory prohibition the sufferer is entitled to sue: *Walters* v. *Green* (3); *Groves* v. *Lord Wimborne*. (4)

[LORD STERNDALE M.R. referred to *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society*. (5)]

The plaintiffs are entitled to have their lamps under their

(1) [1896] 1 Ch. 811; [1899] 1 Ch. 255.
(2) [1921] 1 K. B. 616.
(3) [1899] 2 Ch. 696.
(4) [1898] 2 Q. B. 402.
(5) 22 Times L. R. 327, 329.

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contract with the employers. They cannot otherwise do their work. The employers are willing to supply them. It is the interference of the defendants which constitutes the actionable wrong. The defendants are not protected by s. 3 of the Trade Disputes Act, 1906. The emphatic word in that section is the word "only." The defendants prevented the plaintiffs from getting their tools with a view to compelling them to abstain from doing what they had a legal right to do. That was an infringement of a direct statutory prohibition and an actionable wrong. The plaintiffs are entitled to the injunction they ask.

[They also referred to *Ashby* v. *White* (1) as being the basis of the right.]

A. Grant K.C. and *W. M. Hunt* for the respondents were not called upon to argue.

LORD STERNDALE M.R. This is an appeal from a judgment of Sargant J. who decided three questions against the plaintiffs and in favour of the defendants, on two of which there is no appeal. I think they are technically included in the notice of appeal, but no argument was addressed to us in support of them, and they were abandoned. The first was that on the facts of this case no action would lie at the suit of the plaintiffs against the defendants, because of the operation of s. 3 of the Trade Disputes Act of 1906. The second was that the plaintiffs were entitled to maintain an action against the defendants by reason of a breach of s. 13 of the Coal Mines Regulation Act, 1887. Against those two decisions, as I have said, there is no appeal.

The third was that the plaintiffs were entitled to maintain an action against the defendants for breach of the obligations imposed upon the defendants and upon other persons, upon the world, in fact, by s. 7 of the Conspiracy, and Protection of Property Act, 1875. On that point we had a long, interesting and able argument occupying considerably more than a day, but when all has been said it seems to me to come

(1) (1703) 2 Ld. Raym. 938; Sm. L. C., 12th ed., vol. i., pp. 266, 288.

back in substance to the decision of the learned judge upon the first question on which there is now no appeal.

The circumstances are these, stating them sufficiently for the purposes of this case. [His Lordship stated the facts as above set out and continued :] The plaintiffs have contended that they are entitled to succeed upon a cause of action founded on s. 7 of the Conspiracy, and Protection of Property Act of 1875. [His Lordship read the material provisions of the section and continued :] The learned judge held that this contention failed, because he was of opinion that the section contemplated something in the nature of violence as being necessary to support a cause of action under it. I do not quite agree with the reasons as stated, but I think the decision is correct, and I rather think the learned judge did not intend to give any reasons other than those which I intend to give.

The contention of the plaintiffs was mainly that they were entitled to maintain the action for a breach of the statutory obligation imposed by s. 7 causing injury to them upon the authority of *Groves* v. *Lord Wimborne* (1) and cases of that nature. I cast no doubt on the principle of those cases, which I take to be that where obligations are created by statute in favour of a certain class of persons any member of that class may maintain an action in respect of special injury occasioned to him by a breach of the obligation. This section however is not of that character. In *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (2) the Court of Appeal held that it makes nothing actionable that was not so before, and that its effect is solely to make what was before only a civil action punishable by a Court of summary jurisdiction. Fletcher Moulton L.J. there said : "Giving to that section the most careful consideration in my power, I come to the same conclusion as is expressed in the judgment of my Lord. I cannot see that this section affects or is intended to affect civil rights or civil remedies. It legalizes nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes

(1) [1898] 2 Q. B. 402. (2) 22 Times L. R. 327, 329.

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of acts which were previously wrongful, i.e., were at least civil torts, with penal consequences capable of being summarily inflicted." The decision is an important one. It proceeds upon a different sub-section to that with which we are concerned, which prohibited wrongful watching and besetting. The Court there held there was watching and besetting without violence and intimidation, but that it was for the purpose of compelling or inducing the employers to employ none but union labour—that is, to compel or induce them to abstain from doing that which they had a legal right to do, but that what was done was not actionable, because the means adopted were not wrong within the meaning of the section. Therefore authority, by which we are bound, establishes that no new right of action is given by the section and no conduct not actionable without the section becomes so by virtue of it. That I think concludes the case. The alleged cause of action here arises, if at all, under sub-s. 3 by reason of the defendants wrongfully depriving the plaintiffs of their tools or hindering them in the use of them. That case was argued entirely upon the action of the defendants in telling, advising, requesting, or whatever may be the correct expression, the lamp man not to give the plaintiffs lamps. I can see no cause of action arising in this dispute in this case except in one possible case to which I shall refer later. As far as I understand the contention it was to this effect. The mineowners were under a contract to give their workmen lamps—I think it was said particular lamps—and therefore the workmen, in this case the plaintiffs, had possession or right of possession or special property in the lamps, and that an invasion of that right even by requesting the mineowners' servant not to give them the lamps was actionable. I understand that a case raising the question whether in circumstances like these the mineowners are under a contract to supply lamps is pending before the Courts, and I mean to say nothing that could tend to prejudge that question. I will assume for the purposes of this case that there is such a contract. There is certainly nothing upon the facts to

show that such a contract, if it exists, gives the plaintiffs a right to any particular lamp. I think they had no possession or right of possession or special property in any particular lamps, and that the action of the defendants did not constitute an actionable wrong except possibly on the one ground to which I have already referred. If therefore what they did was within the section depriving the plaintiffs of their tools or the use of them or hindering them in such use, which I assume for the purposes of the case but do not decide, it was not wrongfully depriving or hindering within the section except for the reasons to which I have alluded. The fact that it was done to compel or make the plaintiffs do or abstain from doing an action which they were legally entitled to do is shown by the case I have referred to not to be of itself sufficient to make the act within the section wrongful.

I proceed to deal with the circumstances under which the act might be said to be actionable. If it were shown that it was done in combination for the purpose of inducing a breach of contract by either the defendants or the mine-owners or for the purpose of interfering with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they willed it might be actionable at common law. That in my opinion is the sole ground on which it could become so, and s. 3 of the Trade Disputes Act, 1906, provides that nothing shall become actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills. I say nothing as to what might be the case on other facts and in other circumstances in respect of their contracts. This case is concerned with a contract of employment and nothing else, and it is upon that contract, and upon that contract alone, that the plaintiffs here could possibly sue, because they have no other contract at all. In my opinion the facts which they have to prove in order to support their alleged cause of

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action are exactly the facts which are mentioned in s. 3 of the Trade Disputes Act, 1906. It cannot, in my opinion, be contended that an action which was prohibited by that section can be maintained by merely changing its name, and calling it an action for breach of s. 7 of the Conspiracy, and Protection of Property Act, 1875, because as I have shown the question of whether it is actionable or not must be considered apart from the section altogether, and if what is done is not actionable apart from the section it is not made so by reason of it. I think Sargant J. when he spoke of the necessity of violence to bring anything done within the section had probably in his mind the necessity of its being wrongful and actionable, and violence is the most obvious way in which it could so become wrongful. In fact without saying that no other circumstances would have that effect, it is difficult to specify what circumstances apart from violence would have. I think the appeal fails, and must be dismissed with costs.

WARRINGTON L. J. I am of the same opinion. It is not now in controversy that there was at the time in question a trade dispute, and that the acts done by the defendants were in furtherance of that dispute. Consequently by reason of s. 3 of the Trade Disputes Act, 1906, if the acts done by the defendants were actionable on the ground only that they interfered with the employment of the plaintiffs or their right to dispose of their labour as they willed, then no action could be brought in respect of those acts. The learned judge has decided that the acts done by the defendants were actionable only on the grounds I have stated, and that so far as the Trade Disputes Act, 1906, was concerned, or by reason of the provisions of that Act, no action could be, brought in respect of them, and it is not disputed now that the decision of the learned judge was right except in one respect. The plaintiffs maintain that the acts done were not only actionable on the grounds mentioned in the Trade Disputes Act, 1906, but that they were also actionable, because they constituted breaches of a statutory prohibition

imposed by s. 7 of the Conspiracy, and Protection of Property Act, 1875. That section provides: [His Lordship read the section.] In the first place does that section create a new actionable wrong? In my opinion it does not. The learned judge decided on the construction of the Conspiracy, and Protection of Property Act, 1875, that the element of violence was essential to the offences specified in the Act, and that inasmuch as violence was absent in the present case the Act had no application to the acts done by the defendants. I am not sure that the learned judge's view of the construction of the Act is, in the terms in which he expressed it, accurate, but I am also not sure that it is not merely a verbal difference between the view I take and that which the learned judge expressed.

In *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (1) it was decided by the Court of Appeal that the Trade Disputes Act, 1906, did not render wrongful anything that was not previously wrongful; but that all it did was to add the sanction of a penalty to that which previously was nothing but a civil wrong. The point is put with extreme clearness by Fletcher Moulton L.J. (2) where he says: "I cannot see that this section affects"—that is s. 7 to which I have referred—"or is intended to affect civil rights or civil remedies. It legalizes nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes of acts which were previously wrongful, i.e., were at least civil torts, with penal consequences capable of being summarily inflicted." If that is so, then on that ground—namely, that there is no statutory right of action—the plaintiffs would fail, but I think they also fail for the reason that what the defendants did was not within the statute at all. Now in the present case I cannot see that what the defendants did, which has been described by my Lord, deprived the plaintiffs of the use of their lamps. Sect. 7 of the Act of 1875 does not say "causes to be deprived" of the use of the tools, and at the outside all that the defendants did was to persuade the lamp man

(1) 22 Times L. R. 327. (2) Ibid. 329.

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whose duty it was to hand out the lamps that it would be better under the circumstances of the case not to hand the lamps to the plaintiffs, but in that I cannot see that there was any "wrongful (which is essential) depriving" of the plaintiffs of the use of the lamps to the use of which they allege they were entitled. Then if I am right with regard to the construction and effect of the section (and I must be right, speaking in this Court, because I am only following the decision of the Court of Appeal in *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (1)), that there is no new right of action created by the statute itself, then the only right of action is that to which I referred at the beginning of my judgment—a right of action on the sole ground that the act of the defendants, among other things, interferes with the employment of the plaintiffs and with the right to dispose of their labour as they will, and an action founded on such a ground since the Trade Disputes Act, 1906, can no longer be maintained.

On the whole, therefore, I think the appeal fails, and must be dismissed.

YOUNGER L.J. I am of the same opinion. Whether the acts alleged and proved against the defendants in this case are or are not, even if wrongful, within the language of s. 7 of the Act of 1875 is, I think, more than doubtful. I will assume, however, without so deciding, that they are. Even so, *Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (1), to which reference has already been made by my Lord and the Lord Justice, clearly shows that no act, even if it be aptly described by that section, is thereby made an offence unless, apart from the section altogether, it constitutes an actionable wrong. Now I will assume, but again without deciding, that the acts proved against the defendants in this case constituted in normal circumstances actionable wrongs at the instance of the plaintiffs. But I then ask myself the question why so much can be said of them, and I can think of no more appropriate answer than this: that

(1) 22 Times L. R. 327.

they amounted to an interference with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they would. I can myself, as I have said, think of no more strictly appropriate answer than one stated in that form of words and no other more closely relevant reply to the question was suggested by counsel for the plaintiffs. If therefore the acts in question be in normal circumstances actionable at all they are so actionable because they amount to an interference with the employment of the plaintiffs, or with the right of the plaintiffs to dispose of their labour as they will and for no additional reason in itself sufficient to make them actionable. But it is admitted that these acts were here committed in furtherance of a trade dispute, and if they were so committed and were actionable only for the reason I have stated, it becomes clear, under s. 3 of the Trade Disputes Act, 1906, that they ceased to be actionable in the circumstances in which they were committed.

Accordingly as it appears to me the plaintiffs have in the circumstances of this case shown no cause of action against the defendants apart from s. 7 of the Act of 1875. That, by authority binding upon us, concludes the case. The learned judge was right in his conclusion, and the appeal should be dismissed.

Solicitors: *Ward, Bowie & Co., for H. J. Nicklin, Walsall; Sharpe, Pritchard & Co., for R. A. Willcock, Taylor & Co., Wolverhampton.*

W. I. C.

EVE J.

1922

Feb. 9.

In re PENRHYN'S SETTLEMENT.

LORD PENRHYN *v.* PENNANT.

[1921. P. 2883.]

Tenant for Life and Remainderman—Capital or Income—Lease granted by legal Tenant for Life under the Settled Land Act, 1882*—Payment on Surrender of Lease—Retainable by Tenant for Life—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 6, 13, 53.

Where a legal tenant for life grants a lease under the power conferred upon him by s. 6 of the Settled Land Act, 1882, money paid as the consideration for accepting the surrender of the lease belongs to him as a casual profit.

The principle applied in *In re Hunloke's Settled Estates* [1902] 1 Ch. 941 extended.

Adjourned Summons.

Under an indenture of settlement, dated December 5, 1887, the plaintiff, Lord Penrhyn, was legal tenant for life without impeachment of waste of certain estates in Wales and England. By an indenture, dated December 6, 1887, the plaintiff, in exercise of a power reserved to him by the settlement, charged the settled estates with a jointure of 3000*l.*, and portions for 40,000*l.* By a disentailing deed, dated October 19, 1915, the settled estates were disentailed and, subject to prior subsisting estates and charges, limited to the defendant, the reversioner, in fee. By an indenture of lease, dated August 19, 1913, the plaintiff, under the power conferred upon him by s. 6 of the Settled Land Act, 1882, demised certain mines, being part of the settled estates, for a term of twenty-one years from August 1, 1913. In 1921 the lessees of the mines decided to surrender the lease, and it was agreed that they should pay 2000*l.* in full discharge of further liability. A question then arose as to who was entitled to the 2000*l.*, and the plaintiff took out this summons asking for the determination of the question whether the 2000*l.* belonged to and ought to be paid by the defendant trustees to the plaintiff, or whether it ought to be apportioned between the plaintiff and the persons interested under the settlement.

Howard Wright for the plaintiff. A legal tenant for life without impeachment for waste has a legal right to accept the surrender of a lease: *In re Hunloke's Settled Estates.* (1) The apportionment made in *In re Rodes* (2) of the surrender money between the parties interested in the estate is not to be found anywhere in the Settled Land Acts. If it came to apportionment in this case, the money would have to be apportioned between the parties interested so as to wear it out during the term of the lease. It was held in *In re Lacon's Settlement* (3) that the tenant for life could retain moneys paid by a lessee as damages for dilapidations. In granting a lease, a tenant for life was bound to see that the lease was a proper one to grant, but once that was done his fiduciary position was determined. The decision in *In re Dealtry* (4) expressed exactly what the plaintiff was contending for here.

[He also referred to *In re Wix.* (5)]

Beebee for the defendants. Where a tenant for life, in granting a lease, has recourse to the Settled Lands Acts, he is a trustee from the outset, and once a trustee always a trustee. Under s. 53 of the Settled Land Act, 1882, he remains a trustee even when taking a surrender. Even if he accepts the surrender outside the Act, he still remains a trustee. There is no case that lays down that a tenant for life can accept surrenders and renew leases as often as he pleases.

EVE J. I think the tenant for life is entitled to retain the moneys paid in respect of this surrender. The lease was granted in August, 1913, under the power conferred by s. 6 of the Settled Land Act, 1882, and, in the exercise of that power, the tenant for life was undoubtedly a trustee under s. 53 of the Act, but the lessor being legal life tenant in possession was in a position to accept a surrender either under the power conferred upon him by s. 13 of the Act, or by virtue of his

(1) [1902] 1 Ch. 941.
(2) [1909] 1 Ch. 815.
(3) [1911] 2 Ch. 17.
(4) [1913] W. N. 138.
(5) [1916] 1 Ch. 279.

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common law right as legal reversioner, and it was in exercise of this latter right that this surrender was accepted. That being so, the tenant for life was not, in my opinion, exercising any fiduciary power. I can find nothing in the Settled Lands Acts which deprives a legal life tenant of his right to accept a surrender of a lease, even though it be a lease granted under the Act, and I think this case is really one to which the principle applied in *In re Hunloke's Settled Estates* (1) ought to be extended. I hold, therefore, that the whole sum paid by the lessees belongs to Lord Penrhyn.

Solicitors: *Hore, Pattisson & Bathurst, for Carter, Vincent & Co., Bangor.*

P. J. B.

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[1921. S. 3856.]

Restrictive Covenant—Breach—No Damage—Mandatory Injunction—Discretion.

Where a defendant commits a breach of a negative legal covenant after warning, the plaintiff is "speaking generally" entitled to a mandatory injunction without proving damage. But if the defendant proves that no damage has been occasioned and offers undertakings that will effectually prevent any future damage by the continuing breach, and the granting of a mandatory injunction would inflict damage on the defendant out of all proportion to the relief given to the plaintiff, the Court ought to refuse it.

The plaintiff's and defendant's houses were separated by a narrow passage belonging to the plaintiff from whom the defendant had purchased her house with two second floor windows overlooking the passage. In defiance of a covenant in her conveyance and notwithstanding the plaintiff's repeated warnings the defendant in converting her house into flats opened a frosted window in the first-floor flat overlooking the passage and immediately opposite the plaintiff's lavatory. The plaintiff claimed a mandatory injunction and damages. Five months after the writ the defendant let the flat on a five years' lease to a tenant, who was not made a party to the action.

The plaintiff attempted but failed to prove that his house would be depreciated in value. The defendant, on the other hand, besides proving

(1) [1902] 1 Ch. 941.

that no depreciation whatever would be caused, offered at the trial to give any undertakings necessary to prevent the acquisition of an easement, to keep the window frosted, and, subject to her tenant's consent, to fasten up the lower part, and merely keep an internal fanlight at the top. The plaintiff, however, declined to make a new bargain at the trial and pressed for a mandatory injunction:—

Held, that having regard to all the circumstances, including the absence of damage, the five years' tenancy in a non-party, and the defendant's proposed undertakings which the Court accepted, it would not be right to grant a mandatory injunction, but it would be sufficient to declare that the opening of the window was a breach of covenant, and to give the plaintiff 40*s.* nominal damages and costs for that breach. The defendant's undertakings would be embodied in the order.

Bowes v. *Law* (1870) L. R. 9 Eq. 636, 642 and *Harrison* v. *Good* (1871) L. R. 11 Eq. 338, 352 applied.

Lord Manners v. *Johnson* (1875) 1 Ch. D. 673; *Doherty* v. *Allman* (1878) 3 App. Cas. 709, 719; *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 315; *Osborne* v. *Bradley* [1903] 2 Ch. 446, 451; and *Elliston* v. *Reacher* [1908] 2 Ch. 374, 395 discussed.

Kilbey v. *Haviland* [1871] W. N. 47; 19 W. R. 698 doubted.

WITNESS ACTION.

The plaintiff as surviving executor and trustee of William Willett the younger, whose estate was being administered by the Court, was equitably entitled in fee simple in possession to No. 8 Grand Avenue, Hove. This house was let at 375*l.* a year on a lease expiring in 1931 but terminable by the tenant in 1924.

By a conveyance on sale dated April 27, 1917, the plaintiff and his then co-trustee as vendors, with the concurrence of certain other necessary parties, conveyed the adjoining house No. 9 Grand Avenue to the defendant, a married woman, in fee simple for 6000*l.* subject to certain restrictions which the defendant covenanted with the vendors to observe—namely (inter alia), that (*a*) no addition or external alteration was to be made without the vendor's written consent and (*b*) the premises were to be used only as a private dwelling house.

The defendant's house was to the north of the plaintiff's house with a 7 feet passage between belonging to the plaintiff. At the date of the conveyance the plaintiff's house had seven windows with frosted glass overlooking the passage. The defendant's house had two frosted glass windows on the second floor.

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In March, 1921, the defendant proposed converting her house into three flats and submitted plans to the plaintiff's surveyor who had been appointed one of the receivers and managers of the Willett estates. The plans showed a new window 6 feet high and 4 feet broad lighting a bedroom in the first floor flat.

On April 7 one of the defendant's solicitors discussed the plans with the plaintiff's surveyor. The surveyor objected that the flats were a breach of covenant (*b*) to use only as a private dwelling house and the window was an external alteration within covenant (*a*). According to the surveyor's evidence he offered to consent to the conversion into flats for 150*l*. but not to the window, which he said would seriously depreciate his property. According to the solicitor's evidence the offer was to include both the flats and the window. The offer was considered exorbitant and was not accepted. An alternative suggestion that the defendant should buy the plaintiff's house was also declined. The internal alterations were then commenced.

On April 22 the defendant's solicitors wrote to the surveyor stating that the proposed window would only overlook a housemaid's cupboard, and that they were surprised at the serious view taken of the other alterations—i.e., the conversion into flats.

The proposed window in fact however also overlooked a lavatory.

On April 26 the surveyor replied that the window would be very objectionable and might prevent an addition to the plaintiff's house at a later date, and for that reason he could not advise the estate to allow it. The other alterations would be detrimental to the plaintiff's house, and for that reason the covenant as to user must be strictly adhered to unless the defendant was prepared to purchase the plaintiff's house, which he would be willing to sell at a reasonable figure.

The internal alterations had to the surveyor's knowledge already been commenced, and on May 12, by which time his objection to the conversion into flats had been waived, he wrote to the defendant's solicitors stating that when he

was at Hove on the previous day he had noticed that the work of alteration was in hand, and reminding them that the plans had not yet been approved and requesting them to put the matter in order.

On May 19 the defendant's solicitors replied that plans showing the external alterations had been submitted and the proposed window, which seemed the only point at variance, like the others would have obscured glass and would not affect the plaintiff's house.

On May 24 the surveyor replied that the plans had been disapproved for the reasons given. The defendant's house had no interest in the passage on to which it was proposed to open the window. It had no doubt an easement for the two existing windows, but that easement could not be extended to include the new window. The defendant must fully comply with her covenants, failing which the plaintiff would have to take such steps as he might be advised and any new window opened out overlooking the plaintiff's house would be blocked up.

The defendant however proceeded with her alterations according to the plans without any further objection made or step taken by the plaintiff. The cutting for the window was commenced on June 28.

On June 29 the plaintiff's solicitors wrote to the defendant's solicitors pointing out that the cutting and insertion of the window was a breach of covenant and requiring the wall to be restored to its previous condition. By this time however the window was completed.

On July 30 the plaintiff with the leave of the Court commenced this action for a mandatory injunction requiring the defendant to close up the window and restore the wall to its former condition, and for damages.

In his statement of claim delivered on November 7 the plaintiff alleged that the existence of the window besides constituting a breach of covenant seriously depreciated the value of the plaintiff's house and involved serious damage to the trust estate.

In her statement of defence delivered on December 12 the

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defendant denied that the construction of the window was a breach of covenant, or that there was any damage. She brought 10*l.* into Court with a denial of liability.

In the meanwhile the defendant had let the first floor flat with its window to a tenant on a five years' lease from November 11, 1921, at a rent of 300*l.*, but this lease was not mentioned in the pleadings, nor specifically disclosed in the defendant's affidavit of documents sworn January 11, 1922, which only referred to "The deeds and documents relating to the freehold" of the defendant's house.

The plaintiff's surveyor gave evidence that the window would greatly depreciate the plaintiff's property. If an easement were acquired it would interfere with future development. He was also apprehensive that the plaintiff's tenant who strongly objected to the window and other alterations might break his lease, in which case there would be great difficulty in re-letting so large a house as it stood. He was unable however to give any estimate of the amount of depreciation.

The defendant's experts on the other hand gave evidence that the window was absolutely unobjectionable and that there would be no depreciation whatever in the capital or rental value of the plaintiff's house.

Micklem K.C. and *Stamp* for the plaintiff. The defendant has committed a breach of a negative legal covenant after repeated warnings. The question of damage, though in fact very serious, is immaterial and the Court has no discretion to refuse a mandatory injunction: *Doherty* v. *Allman* (1); *McEacharn* v. *Colton* (2); *Lord Manners* v. *Johnson* (3); *Shelfer* v. *City of London Electric Lighting Co.* (4); *Osborne* v. *Bradley* (5); *Elliston* v. *Reacher*. (6)

Luxmoore K.C. and *Farwell* for the defendant. A technical breach has no doubt been committed, but it has caused no damage whatever. The plaintiff can block up the window

(1) 3 App. Cas. 709, 719.
(2) [1902] A. C. 104, 107.
(3) 1 Ch. D. 673, 679.
(4) [1895] 1 Ch. 287, 315.
(5) [1903] 2 Ch. 446, 451.
(6) [1908] 2 Ch. 374, 395.

whenever he likes. But, for the sake of peace and to avoid any question of acquisition of an easement or invasion of privacy, the defendant offers to give any undertakings necessary to prevent the acquisition of an easement, to keep the window frosted, and, subject to her tenant's consent, to fasten up the lower part and merely keep an internal fanlight at the top. These undertakings can be embodied in the order: *Pettey* v. *Parsons*. (1)

Micklem K.C. I cannot enter into a new bargain at this stage of the action. I must press for a mandatory order.

Luxmoore K.C. There is no doubt that "speaking generally" the Court has no discretion to refuse an injunction to enforce a negative legal covenant even if the plaintiff fails to prove damage: *Osborne* v. *Bradley*. (2) But where the breach is more or less trivial and the defendant proves an entire absence of damage the Court has a discretion to refuse a mandatory injunction: *Bowes* v. *Law* (3); *Kilbey* v. *Haviland* (4); *Harrison* v. *Good* (5); Kerr on Injunctions, 5th ed., p. 495.

The plaintiff knew that the defendant was building according to the plans submitted, and ought to have moved for an injunction before the window was cut. The plaintiff's contention pushed to its logical conclusion would entitle him as of right to a mandatory injunction if the defendant merely removed one brick for the purpose of a ventilator. This cannot be the law.

In the present case a mandatory injunction would be futile, as the flat is let for five years and the tenant is not a party to the action. It is obviously a case for nominal damages under Lord Cairns' Act—i.e., the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), s. 2. (6)

Micklem K.C. in reply. The removal of one brick for a

(1) [1914] 1 Ch. 704, 723, 724; reversed on other points [1914] 2 Ch. 653.
(2) [1903] 2 Ch. 446, 451.
(3) L. R. 9 Eq. 636, 642.
(4) [1871] W. N. 47; 19 W. R. 698.
(5) L. R. 11 Eq. 338, 352.
(6) This Act was repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but the jurisdiction was preserved by s. 5: see *Sayers* v. *Collyer* (1884) 28 Ch. D. 103, 107.

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ventilator would obviously be a case of de minimis, but a window, 6 feet by 4 feet immediately opposite the plaintiff's lavatory is not a slight, formal or unsubstantial breach within *Harrison* v. *Good*. (1)

The plaintiff waived the objection to the flats, but definitely refused the window, and after his surveyor's decisive letter of May 24, he naturally assumed that it would not be opened. Before it was actually opened there was no threat that would have justified an action.

Bowes v. *Law* (2) was merely a case of enforcing an equity and not a direct legal covenant, as in the present case. This is an important distinction: see *Osborne* v. *Bradley* (3) and *Elliston* v. *Reacher*. (4) *Kilbey* v. *Haviland* (5) is not good law.

The suggestion that the defendant can break a negative legal covenant, and then avoid a mandatory injunction by granting a lease, is more novel than sound. It would be an easy way of escaping from restrictive covenants. The tenant of course has notice of the landlord's title. The plaintiff does not however ask for any injunction against the tenant, who is not a party to the action, but he is entitled to a mandatory injunction against the defendant. The inability, if any, to obey this injunction can be set up on a subsequent application to enforce it.

ASTBURY J. [after stating the facts and pointing out that the plaintiff's surveyor had endeavoured to use the proposed breach of covenant as a means of obtaining 150*l*. or of selling the plaintiff's house continued:] There is no question, of course, that opening this window was a breach of the defendant's covenant. The only question is whether, in all the circumstances of this case, I ought to grant a mandatory injunction or to give damages under Lord Cairns' Act. The defendant has offered at the Bar to give any undertaking that may be required or effective to prevent the acquisition

(1) L. R. 11 Eq. 338, 352.
(2) L. R. 9 Eq. 636, 642.
(3) [1903] 2 Ch. 446, 451.
(4) [1908] 2 Ch. 374, 395.
(5) [1871] W. N. 47; 19 W. R. 698.

of any easement for this window; she has also offered to maintain frosted glass in the window and subject to her tenant's consent to screw the lower part up, which will have the effect of preventing the privacy of the plaintiff's house being in any way interfered with.

The language of Lord Cairns' Act is perfectly general. Sect. 2 provides that: "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance. . . . ."

In *Shelfer* v. *City of London Electric Lighting Co.* (1) Lindley L.J. said: "But in exercising the jurisdiction thus given attention ought to be paid to well-settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict." If the wrongdoer has inflicted no injury, and does not intend to inflict any, it is always a difficult question in these cases whether a mandatory order is one which the Court ought in conscience to grant.

This is a difficult case to deal with, because no damage or injury of any sort or kind has been or can be inflicted upon the plaintiff; but there is a distinct breach of covenant by the defendant with full knowledge of the covenant, and of the plaintiff's objections to the particular breach.

Before referring to the authorities I will read a passage from Kerr on Injunctions, 5th ed., p. 495, which seems to me to sum up accurately the result of the cases upon this

(1) [1895] 1 Ch. 287, 315.

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subject: "In exercising the jurisdiction by way of mandatory injunction against acts in violation of contract, covenant, or agreement, the Court looks to the express stipulation of the agreement, and is not, as in cases of trespass or nuisance, influenced by considerations as to the nature or extent of the damage, or the comparative convenience or inconvenience of granting or withholding the injunction. A man who enters into an agreement is bound in equity to a true and literal performance of it. He cannot be suffered to depart from it at his pleasure, leaving the other party to his remedy by damages at law. There may be cases in which it is so clear that the mischief to arise from a breach of covenant would be inappreciable that the Court may decline to interfere on the ground that a mandatory injunction would be out of all proportion to the requirements of the case, and would operate with extreme harshness on the defendant. But as a general rule, the inconvenience to the defendant will not in such cases be taken into consideration. Nor can the defendant be permitted to set up the inconvenience to the public which would arise from his being compelled to perform his agreement."

In *Lord Manners* v. *Johnson* (1) the purchaser of a plot of land, part of a building estate, covenanted with his vendors, who were mortgagees in possession of the estate, not to erect any building on his plot nearer to the road in which it was situate than the line of frontage of the then present houses in that road. He then erected two houses on his plot, each of which had a bay window projecting 3 feet beyond the line of the existing houses, and carried from the foundation up to the roof. Upon bill filed by the transferee of the mortgage and a purchaser of a contiguous plot who had entered into similar covenants, it was held, first, that the bay windows were "buildings" within the meaning of the covenant, and the erection of them a violation of it; secondly, that, there being a clear breach of covenant, the covenantees were entitled to their injunction without the necessity of showing damage; thirdly, that invasion of privacy constituted

(1) 1 Ch. D. 673.

damage; fourthly, that the covenant being not to do an act the doing of which caused an invasion of privacy, it was not necessary for the covenant in terms to purport to preserve privacy; and, fifthly, that both the plaintiffs had material interests sufficient to support the suit. Hall V.-C. said (1): "Then it is said it is not a case for a mandatory injunction, because, although the covenant may be such as I have held it to be, not only is the amount of damage and injury nil, but more than that, what has been done is actually an improvement to the [mortgagee] plaintiff's property. Of course [that] plaintiff is the best judge of what will be an improvement to his own property; but I take it now to be the law that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and if any, what injury or damage is consequent on the breach of the covenant." He then referred to *Kemp* v. *Sober* (2) in which Lord Cranworth said: "It was said that this case comes within the principle of those cases in which the Court has refused to interfere because no damage has been actually sustained. But a person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept; and the feeling of anxiety is damage." Then Hall V.-C. continued (3): "Then there is the case of *Tipping* v. *Eckersley* (4) where Wood V.-C. laid down the rule thus: 'If the construction of the instrument be clear, and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction. And I apprehend the Court may so interfere whether the defendant has or has not actually committed the breach in respect of which the interference of the Court is sought. For in a case of contract it is enough if the defendant claims and

(1) 1 Ch. D. 679.
(2) (1851) 1 Sim. (N. S.) 517, 520.
(3) 1 Ch. D. 680.
(4) (1855) 2 K. & J. 264, 270.

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insists on a right to do the act, although he has not already done it,' " and so on. Towards the end of his judgment Hall V.-C. said (1): " I see no reason why the Court should not exercise its jurisdiction by a mandatory injunction as to the bow windows. I cannot listen to suggestions of hardships and loss of value, and so forth. The defendant, by cutting off the bow windows, will have to make every one of his rooms that has a bow window smaller. But he must take the consequences of that."

In *Doherty* v. *Allman* (2), which is now the leading case upon this subject, Lord Cairns said: " My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves." Where, however, the act has been done, and the question is whether or not a mandatory injunction should be granted, slightly different considerations obviously apply.

In *Bowes* v. *Law* (3) there was a covenant against building in a particular way. That covenant was broken, and a building in breach of it was in fact erected. James V.-C. refused a mandatory order, and said that the question for the Court was: " Whether a mandatory injunction ought to be granted, or whether the alternative jurisdiction, which has been given to the Court by recent legislation, should be resorted to. I am of opinion, having regard to all the

(1) 1 Ch. D. 681. (2) 3 App. Cas. 709, 719.
(3) L. R. 9 Eq. 636, 642.

circumstances, and considering that no substantial annoyance has been occasioned to the plaintiff, and no substantial injury done to any right of property of his, that a declaration will be sufficient for the purpose of protecting the title, and I do not think it necessary to give the plaintiff the power of doing such an unreasonable and unneighbourly act as that of taking down this vinery, which is a great convenience to the defendant, and the taking down of which would not confer on the plaintiff himself any benefit. I propose, therefore, to declare that the erection of a boundary wall on the piece of ground is no breach of the covenant in the bill mentioned, but that the raising of the wall for the purpose of placing, and the placing against it of a vinery, are breaches of the covenant; but that under the circumstances of the case, the Court does not think fit to order the removal thereof, and assesses the damages in respect thereof at forty shillings." There was a clear breach there, but James V.-C. took into consideration the circumstances of the case, and in his discretion refused to do that which, in his judgment, would have inflicted an unnecessary injury upon the defendant and given no benefit to the plaintiff.

In *Kilbey* v. *Haviland* (1), which may or may not go beyond the limit that the Court ought to observe at the present time, Bacon V.-C. said that a mandatory injunction was "a thing which the Court only granted in extreme cases, and where it was absolutely necessary to do justice." That was a case where the judge thought the damages amounted to not more than 10*l.*, and although the defendant's conduct was wholly inexcusable, he refused a mandatory order and gave judgment for 10*l.* and costs.

In *Harrison* v. *Good* (2), the same learned judge said: "We all know that, although the Court of Chancery interferes, when it thinks it right, by way of injunction to prevent the violation of a covenant, yet, if the violation is so slight, formal, and unsubstantial that the plaintiff can have no ground in conscience to complain of it, the Court will not grant an injunction."

(1) [1871] W. N. 47; 19 W. R. 698. (2) L. R. 11 Eq. 338, 352.

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In *Osborne* v. *Bradley* (1) Farwell J., looking exclusively at the cases that I have referred to in favour of granting an injunction in these covenant cases, and referring to *Doherty* v. *Allman* (2), said: "Where there are negative covenants which are binding on the defendant the Court has, speaking generally, no discretion to consider the balance of convenience or matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeking to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue. Contractual obligations do not disappear as circumstances change, but a person who is entitled to the benefit of a covenant may, by his conduct or omission, put himself in such an altered relation to the persons bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction." The learned judge there is speaking more directly of injunctions to prevent a wrong than mandatory orders. But even in that case he does limit his language to saying that, "speaking generally," the Court in those cases has no discretion.

In *Elliston* v. *Reacher* (3) Parker J. said: "The defendants contend that the plaintiffs have not proved any substantial damage, and that in default of proof of such damage no injunction ought to be granted. I do not think this is a correct proposition of law. As was said by Farwell J. in *Osborne* v. *Bradley* (1), the rule enunciated by Lord Cairns in *Doherty* v. *Allman* (2) prima facie applies to all restrictive covenants, and though it may well be that if the plaintiffs' right be equitable only, as in the present case, the Court will more readily award damages instead of an injunction, it is in my opinion clear from the case of *Richards* v. *Revitt* (4) that the absence of proof of substantial damages is not by itself sufficient to warrant that course being adopted. Of course in exercising its discretion the Court is bound to consider all the circumstances of the case."

I have now to apply the law so laid down to the facts of the

(1) [1903] 2 Ch. 446, 451.
(2) 3 App. Cas. 709, 719.
(3) [1908] 2 Ch. 374, 395.
(4) (1877) 7 Ch. D. 224.

present case, loyally following the views expressed in these various authorities. Prima facie, where a defendant commits a breach of a negative covenant with his eyes open, and after notice, the Court will grant a mandatory order, but there is, and must be, some limitation to this practice. Supposing that this defendant had taken a brick out of her south wall, and had put in an iron ventilator, that would have been a direct breach of this covenant, as far as breach is concerned, as direct as the particular breach in the present case; but it is idle to suppose that any Court would listen to an action claiming a mandatory injunction if those had been the facts. The reason is this, that if there is really no damage of any sort or kind suffered by a plaintiff by reason of the breach of a negative covenant of this character, and if the granting of a mandatory order would inflict damage upon the defendant out of all proportion to the relief which the plaintiff ought to obtain, the Court will, in my opinion, and ought, in my judgment, to refuse it.

Now in the present case I am quite aware that it is not open to the defendant to bargain in invitum with the plaintiff for purchasing the right to commit, and to continue the commission of this breach, but there is this substantial difficulty in the way of granting a mandatory order. The flat in which this window is situated has been let on a lease to a person not a party to this action for a term of five years. It is absolutely impossible to disregard that fact. The plaintiff says that the lease may have been taken with notice of the covenant and notice of the breach. Well, anything may have happened. There is no evidence at all of the circumstances in which it was taken, and no questions were asked in cross-examination about it.

Again, although the plaintiff's surveyor took objection to this window, he did allow this building to proceed from some date early in April until June 28, when the wall was cut for the window, without taking any steps to stop the alterations then in progress. He knew perfectly well that those alterations involved the putting in of this window. He stated in the box that he supposed or thought that the

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defendant might alter her plans for the construction of her flats. He had no right to think anything of the kind. He never asked a question about it. He had no reason to suppose that the alterations were not proceeding in pursuance of the plans which had been furnished to him from the commencement, and he did in a sense stand by and allow these alterations to be made, although he from time to time objected to this window, and asked for money in respect of some portion, at all events, of these alterations, and tried to induce the defendant to purchase the plaintiff's house.

Now if the defendant were to give no undertakings at all I still think that no substantial damage would be inflicted upon the plaintiff. It is said that it might be a serious thing for an easement to be obtained for this window. The defendant already has two other windows in the same wall which would, or probably would, interfere as much with the plaintiff's alteration of his premises as the window complained of; but in any case, the plaintiff can prevent the obtaining of any easement even if the defendant desired to obtain one, which is not the case.

Having regard to all the circumstances of this case, and having regard to the undertakings which the defendant is willing to give, which will prevent any easement being acquired in the future, and which will prevent any invasion of the plaintiff's privacy, I am of opinion that there is no damage of any sort or kind suffered by the plaintiff by reason of the existence of this window. I am quite unable to award to the plaintiff the 10*l.* which has been paid into Court as damages, as I do not think any damages really have been suffered at all. But what I propose to do, taking as well as I can everything into consideration, and with the desire to do justice between these two parties, is this: I will make a declaration that the opening of this window constituted a breach of covenant; I will award to the plaintiff forty shillings damages, which I think he has not suffered; I will direct the defendant to pay the costs of this action to be taxed; and I will allow the defendant to give an undertaking, which is to be incorporated in the order, not to claim in the future any easement

in respect of this window, to keep the window always glazed with frosted glass, and, if she can obtain her tenant's consent, to keep the window screwed up, as far as the bottom sash is concerned, so that there can be no overlooking of the plaintiff's premises and no invasion, as is suggested, of his privacy. The plaintiff will take the 10*l.* out of Court on account of costs.

Solicitors: *Field, Roscoe & Co.; Adkin & Son, for Nye & Clewer, Brighton.*

G. R. A.

In re WARD.

HARRISON *v.* WARD.

[1921. W. 2573.]

Revenue—Income Tax—Super Tax—Income of Wife living with Husband—No separate Assessment—Death of Wife—Tax not accounted for during her Life—Liability of Husband—Indemnity—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 45—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *General Rule* 16.

Sect. 45 of the Income Tax Act, 1842 (reproduced in No. 16 of the "Rules applicable to Schedule E" in the Income Tax Act, 1918), enacted that the profits of a married woman living with her husband were to be deemed profits of the husband and were to be charged in his name for the purposes of income tax.

A husband assessed to income tax jointly with his wife under s. 45 of the Act of 1842, and who is called upon after her death to pay income tax and super tax, not accounted for in her lifetime, in respect of income from property of which she was tenant for life, has no right of indemnity against her estate, either under the Act or in equity, for the tax so paid by him in accordance with the liability imposed upon him by the Act.

ADJOURNED SUMMONS.

The testatrix, who died on January 8, 1919, was a lady of considerable private means. She was married to her husband, the defendant J. S. Ward, in October, 1897, who at her urgent request subsequently resigned his appointment, thereby losing his salary and forfeiting all right to any pension. He had very little private means of his own.

The testatrix was tenant for life of settled property of large value including sums of registered or inscribed 5*l.* per

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cent. War Loan, Exchequer Bonds, and property in Australia. After her death claims were made by the Crown for income tax and super tax in respect of (*a*) 136*l.* 1*s.* for income tax not accounted for during her life in respect of the War Loan and Exchequer Bonds included in the settlement under which she was tenant for life, and (*b*) 154*l.* 2*s.* 4*d.* for super tax on the joint income of the testatrix and her husband and not accounted for in the lifetime of the testatrix. Her husband had not applied during her lifetime to be separately assessed, and he was assessed for and required to pay these sums. During her life the testatrix had always herself paid the taxes in respect of her income.

This was a summons by the executors of her will for the determination of the question whether as between her estate and her husband the said sums ought to be borne by her estate or by him.

Harman for the plaintiffs.

Hughes K.C. and *W. M. Hunt* for the defendant husband. Sect. 45 of the Act of 1842, under which the wife's profits are to be deemed the profits of the husband and to be charged in his name, does not mean that the liability is to be thrown on him. The Act makes no provision for a case like this, but on general principles we submit that he ought to be indemnified; qui sentit commodum, sentire debet et onus. The assessment in this case is really analogous to the assessment of the tax under Sch. A upon the occupier as being the person more easily reached, but he has a right over against his landlord for the tax so paid. The payment by the husband is made by him as agent for his wife. The words "shall be deemed the profits of the husband" are confined to the purposes of the Act and do not determine the rights as between husband and wife. The tax is really the wife's debt, and the husband who pays it is entitled to be indemnified. Indemnity does not depend upon contract: *Dering* v. *Earl of Winchelsea* (1); it is "bottomed in equity." Income tax is a tax on the property, not on the person; the person is charged because he has property; per Sankey J. in *Williams* v.

(1) (1787) 1 Cox, 318; 2 Wh. & T. L. C., 8th ed., 539.

Singer (1), and what is being charged is the profits of the wife, and for the convenience of the revenue the charge is made on the husband, who is entitled to an indemnity.

The Income Tax Act, 1918, does not apply to this case or afford any help in determining this question. The provisions of s. 45 of the Act of 1842 are reproduced in No. 16 of the rules applicable to Sch. E.

Leslie Mumford for the defendant residuary legatees. Under s. 45 the husband is the only person liable to pay. No question of agency arises, and there is no case or provision for any indemnity, for the husband does not discharge any debt for which his wife is liable.

[He referred to *Bowers* v. *Harding*. (2)]

PETERSON J. The question which I have to determine in this case arises from the provisions of s. 45 of the Income Tax Act, 1842. The testatrix was a lady with a considerable income and her husband, the first defendant, was a gentleman whose income was very much smaller. In accordance with the provisions of s. 45 of the Income Tax Act, 1842, the husband was assessed in respect of that part of his wife's income from which the tax had not been deducted at the source. The question now arises whether he is entitled to be indemnified out of her estate in respect of the tax on her income for which he has been assessed. There does not appear to be any authority on the point. The claim made by the husband is sought to be based on what is said to be the equitable principle that inasmuch as he has by statute been required to pay tax in respect of his wife's property he is entitled to be indemnified by her or out of her estate. The material provisions of s. 45 are as follows: "any married woman . . . . having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties, and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried." A married woman is thus chargeable with the tax imposed by the Act except in the cases subsequently mentioned. The next part of the section is a proviso which states the exception: "Provided always,

(1) [1918] 2 K. B. 749, 757. (2) [1891] 1 Q. B. 560.

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that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee." There is also a second proviso which deals with the case of a married woman living in Great Britain separate from her husband. The first proviso, in my opinion, amounts to an enactment that where a married woman is living with her husband she shall not be chargeable under the first part of the section, but the profits in question are to be deemed the profits of the husband and not the profits of the wife, and the same, that is the profits which are to be deemed the husband's profits, are to be charged in the name of the husband and not of the wife. The proviso, therefore, takes the present case out of the first part of the section and imposes the liability for the tax on the husband. The result, therefore, in my view is that the liability to tax in the case of a married woman living with her husband is thrown upon the husband, and not upon the wife.

It has been contended on behalf of the husband that, although he is the person who under the section is liable to pay the tax, he is entitled to claim an indemnity from his wife for the amount of tax which he pays in respect of her income. I have not been convinced by the argument that there is any such right of indemnity. The Act in fact provides that the income in question is to be treated as the husband's income and that the husband, and not the wife, is to be charged with the tax. The obligation under the section is the husband's, not the wife's. If it had been contemplated that the husband was to have some right of indemnity for payment made by him in compliance with the section I should have expected that the Act would have provided for it ; but there is no such provision. There is no right of indemnity given by the Act, nor can I see that the husband has any right of indemnity in equity for what he pays in accordance with the liability imposed upon him by the statute.

Solicitor for all parties : *Shirley W. Woolmer.*

R. M.

CARLTON MAIN COLLIERY COMPANY, LIMITED *v.* HEMSWORTH RURAL DISTRICT COUNCIL.

P. O. LAWRENCE J.

1921 *Dec.* 15, 16, 19, 20, 21.

1922 *Jan.* 11, 12; *Feb.* 15.

[1920. C. 4268.]

Local Government—Privies and Water-closets—Local Authority—Powers—Power to require sufficient Water-closet—Scheme for conversion into Water-closets—Notices—Validity—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 36—*Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 39.

The inspector of nuisances for the rural sanitary authority of H. in answer to complaints inspected the privies attached to four miners' dwelling houses, belonging (with many others) to a colliery company, and reported to the authority that he found liquid soaking through the walls of the privies and oozing up through the ground in the back yards of those houses, that the privies were insufficient within the meaning of s. 36 of the Public Health Act, 1875, and recommended that notices should be served on the company to provide a sufficient water-closet to each of the houses. In consequence of that report, on September 7, 1920, the authority caused the notices, so recommended, to be served on the company. In December, 1918, the authority or their predecessors had passed resolutions adopting suggestions of the Sanitary Committee that every case of a defective privy reported by the inspector should be separately considered on its merits, and if the Sanitary Committee were satisfied that it was defective notice should be served requiring the owner to convert the privy into a water-closet under s. 36, and that cases of insufficiency in point of number should be dealt with under s. 39 of the Public Health Acts Amendment Act, 1907.

In an action by the colliery company against the local authority claiming a declaration that the notices were ultra vires, and for an injunction, the Court was satisfied by the evidence that the report of the inspector was in accordance with the facts and honestly made by him in the proper discharge of his duties; that he was not induced or inspired by the authority to make the report for the purpose of bringing about a general conversion of the privies in question into water-closets in furtherance of the resolution of the authority; but that he honestly believed that they were insufficient within s. 36; that the authority bona fide came to the conclusion, after considering the circumstances of each case, that the houses were without sufficient accommodation within the meaning of s. 36; that the proper remedy in each of the cases was the substitution of a water-closet for the existing privy; and that the authority did not attempt to embody in the scheme a provision to misuse the powers conferred by s. 36:—

Held, that the resolution passed by the authority was intra vires and unobjectionable; that the notices were not served in pursuance of a scheme; that the mere fact, as the evidence showed, that the majority of the members of the authority were individually predisposed in favour of water-closet accommodation did not disqualify the authority as a body from exercising, and that it did in fact exercise, a proper discretion

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in the particular cases in question, and consequently that the notices were valid.

Whether a house is without a sufficient water-closet, earth-closet or privy must depend upon the circumstances of each case. It is a question of degree whether a structural defect in the conveniences makes them "insufficient" within s. 36: a house would be without a sufficient convenience within that section if the convenience has become structurally defective and insanitary to such an extent that it requires substantial structural work to render it fit for use. The powers under ss. 36, 41, and 94 to 96 are cumulative and not mutually exclusive; and a case which might be dealt with under s. 41 or ss. 94 to 96 might also come within the scope of s. 36.

WITNESS ACTION.

The plaintiffs in this action sought a declaration that certain notices which were served upon them at the instance of the defendants (hereinafter called the Council) purporting to act under powers conferred by s. 36 of the Public Health Act, 1875, were ultra vires and void and for an injunction to restrain the Council from entering upon the four houses belonging to the plaintiffs in respect whereof the notices were served—namely, 38 and 39 King Street and 185 and 186 Queen Street, South Elmsall, in the county of York, and from converting the privies attached to those houses into water-closets.

The following statement of the facts is taken from the judgment of P. O. Lawrence J.: "The plaintiffs are the owners of four small dwelling-houses known as Nos. 38 and 39 King Street and 185 and 186 Queen Street, South Elmsall, in the county of York which (together with a large number of similar houses) had been erected by the plaintiffs for the accommodation of miners employed by them at their colliery. The King Street houses were built in 1904 and the Queen Street houses in 1908. Each house forms part of a continuous row of similar houses extending along the whole length of the street and has two rooms on the ground floor, two rooms on the first floor and an attic room. Each house has a back yard measuring roughly 20 feet in depth and 13 feet in width in which there is a trapped gully placed underneath the kitchen window which gully is connected with a sewer running underneath a back street behind the

houses. At the end of the back yard furthermost from the house there is a privy which connects with a midden or ashpit. This midden projects into the adjoining premises and is used in common with the adjoining house. Water is laid on to each house, the water main runs underneath the back street and the service pipe is taken past the entrance to the privy up the back yard to the house. King Street and Queen Street are two of a group of streets containing altogether upwards of 260 houses of the same type. South Elmsall is a contributory place within the district of which the Council is the rural sanitary authority. The Council approved the plans of the houses and passed the houses for occupation. Early in the month of July, 1920, Mr. McAllister, the Council's inspector of nuisances, received complaints as to the condition of the privy middens at 38 and 39 King Street and 185 and 186 Queen Street. In consequence of these complaints Mr. McAllister on the 12th July, 1920, inspected these middens and found that they contained a large quantity of liquid which was soaking through the walls. In the case of the midden serving the privies at Nos. 38 and 39 King Street, the liquid besides soaking through the walls was oozing up through the ground in the back yard of No. 38 and running down towards the house, and in the case of the midden serving the privies at Nos. 185 and 186 Queen Street the liquid was soaking through the wall on to the back street. On the 22nd July, 1920, there was a meeting of the General Sanitary Committee of the Council. Mr. McAllister attended this meeting and reported on (inter alia) the condition of the privy middens at 38 and 39 King Street and 185 and 186 Queen Street. It was the custom for Mr. McAllister to enter the reports he intended to make to the Sanitary Committee in a book called the monthly report book and to produce this book at the meetings of this committee, and this course was followed at the meeting of 22nd July, 1920. The monthly report book contains the following entries: 'Complaints having been received that there was a nuisance existing at No. 38 King Street South Elmsall which was found to arise from the privy midden, I now report that the privies at

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Nos. 38 and 39 King Street which empty into one midden, are insufficient within the meaning of Section 36 of the Public Health Act, 1875, from the midden containing a large quantity of water which is soaking through the walls of the privies and also through the ground and draining towards the house door, the nuisance being acute. The property belongs to the Carlton Main Colliery Company, and notices are now required to be served calling upon the owners to provide a sufficient water-closet and dustbin for each house. At 185 and 186 Queen Street Elmsall, similar condition to the above exists and I now report that the privies at each house are insufficient within the meaning of Section 36 of the Public Health Act, 1875, and notices are now required to be served on the owners to provide a sufficient water-closet and dustbin for each house.' In addition to the report contained in the monthly report book Mr. McAllister handed to the meeting two formal reports dated 22nd July, 1920. These reports are in the same form. The report as to the King Street houses is as follows: 'Gentlemen. In pursuance of Section 36 of the Public Health Act 1875, I have the honour to report to you that on the 12th day of July, 1920, I examined the houses Nos. 38 and 39 King Street South Elmsall within the said district, and found that the said houses were without a sufficient water closet, earth closet, or privy, and an ashpit with proper doors and coverings. I therefore recommend that notice be forthwith given to the owners of each of the said houses requiring him within the space of twenty-eight days to provide for each of the said houses a sufficient water closet and a sanitary dust bin. I have the honour to be, Gentlemen, Your obedient servant, W. P. McAllister, Inspector of Nuisances.' The reports of Mr. McAllister thus presented to the General Sanitary Committee were considered by that committee at their meeting on the 22nd July, 1920, and after discussion and consultation with Mr. McAllister, the Committee resolved that instructions be given for the service of notices as recommended by the two formal reports. The resolution thus arrived at by the General Sanitary Committee on the 22nd July, 1920, was

reported to the Council who at its meeting on the 5th August, 1920, after discussion passed a resolution adopting the report of the General Sanitary Committee. In pursuance of the last mentioned resolution Mr. McAllister signed and served on the plaintiffs the four notices complained of. They are all (mutatis mutandis) in the same form. The one relating to No. 38 King Street is as follows: 'Local Government Act, 1894. Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 36).' 'To F. J. Holdsworth Secretary to the Carlton Main Colliery Company, Colliery Offices, Grimethorpe, the owners of 38 King Street South Elmsall in the rural district of Hemsworth. Take notice that the Rural District Council of Hemsworth in the county of York being satisfied on the report of their Inspector of Nuisances dated the 22nd day of July, 1920, that the house above described is without a sufficient watercloset earth-closet or privy and an ashpit furnished with proper doors and coverings hereby require you, in pursuance of the provisions of the Public Health Act, 1875, to provide for the said house, within the space of twenty-eight days from the service upon you of this notice a sufficient watercloset and an ashpit furnished with proper doors and coverings (a sanitary dust bin may be provided in place of ashpit). If the above notice is not complied with within the time aforesaid the Rural District Council of Hemsworth may, at the expiration of such time, do the work required to be done, and recover the expenses incurred in so doing, in the manner provided by the said Act. Dated this 7th day of September, 1920. William P. McAllister, Inspector of Nuisances.'

"The plaintiffs contend that these notices are invalid on two main grounds—namely, First because the resolution of the General Sanitary Committee of the 22nd July, 1920, and the resolution of the Council of the 5th August, 1920, in so far as those resolutions involve a finding that 38 and 39 King Street and 185 and 186 Queen Street were without sufficient privies were not honest resolutions bona fide passed with regard to these particular four houses, but were resolutions passed in pursuance of a scheme to procure the

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conversion of all the privies in this district into waterclosets at the owners' expense under Section 36 of the Act of 1875, whether or not the circumstances of the particular cases were such as to warrant the exercise of the powers conferred by that section, and because the reports of Mr. McAllister upon which these resolutions were based were not unbiased reports genuinely recording Mr. McAllister's own observations and opinions, but were reports which the Council had induced or inspired him to make for the purpose of carrying out the alleged scheme, and Secondly, because, even assuming the reports to have been genuine and the Council to have been justified in finding and to have honestly found that it appeared therefrom that the four houses in question were without sufficient privies, yet the Council did not exercise a proper discretion in requiring the plaintiffs to provide waterclosets in the place of the existing privies.

"These two main grounds are separate and distinct, but the following undisputed facts are largely common to both: Some time prior to April, 1917, the Council had decided that on the termination of the war it would adopt and carry out a scheme for the conversion of all privies in the district into waterclosets. There is apparently no minute recording this decision, but it is referred to in the minutes of the meeting of the General Sanitary Committee, held on the 6th April, 1917, when dealing with a letter of the Chairman of the annual Hemsworth Parish Meeting recommending the adoption of such a scheme in the parish of Hemsworth. Shortly after the armistice the medical officer, the surveyor, and the inspector of nuisances waited upon the Clerk to the Council for the purpose of urging the desirability of forthwith adopting and carrying out the scheme for conversion. As the result of this interview, the following suggestions were formulated for submission to the General Sanitary Committee at their next meeting, namely, that every case of an alleged defective privy reported by the inspector should be considered separately on its merits, and, if the Sanitary Committee were satisfied that it was defective, a notice should be served on the owner under Section 36, of the Public

Health Act, 1875, giving him notice to convert the same into a water-closet, if the public water supply and drainage were all right; also that any insufficiency in number should be dealt with under Section 39, of the Public Health Amendment Act, 1907, and further that where the existing privies were in fair repair any conversion of the same into water-closets should be done under Section 39, at the joint expense of the owner and the Council, the surveyor to corroborate the inspector as to whether such privies were defective or not. These suggestions were duly brought before a meeting of the General Sanitary Committee held on the 12th December, 1918, at which meeting it was resolved that such suggestions be adopted and acted upon. This resolution was approved and adopted by the Council on the 26th December, 1918. On the 6th February, 1919, the General Sanitary Committee resolved to require the owners of certain houses in Charlesworth Row and Harwood Terrace Ryhill to convert their privies into water-closets under Section 39, of the Public Health Amendment Act, 1907. Although this resolution was approved and adopted by the Council on the 21st February, 1919, the Council does not seem to have ultimately converted these privies under that section. At a meeting of the General Sanitary Committee held on the 16th October, 1919, a letter dated the 3rd October, 1919, from the Shafton Parochial Committee was read recommending that all earth-closets in the Parish of Shafton be forthwith converted into water-closets, and it was resolved that such conversions be carried out as soon as possible, the worst cases to be taken first, and on the 30th October, 1919, the Council adopted the recommendation. At a meeting of the General Sanitary Committee held on the 2nd February, 1920, it was resolved that the Council take steps to convert the privies into water-closets in Kinsley at the earliest possible moment. On the 4th March, 1920, the Council's inspector of nuisances suggested to the General Sanitary Committee that the privies at Nos. 1–10 Blundell Road, Moorthorpe, although in good condition should (as the owner was willing) be converted into water-closets and that half the cost should be borne

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by the Council. This suggestion was reported to the Council who on the 18th March, 1920, declined to adopt it and referred the matter back to the Committee for re-consideration. On the 1st April, 1920, the General Sanitary Committee after reading a letter from the Brierly Parochial Committee requesting the Council to proceed with the conversion of all earth-closets in that parish into water-closets resolved that the Clerk be instructed to reply to the effect that the question of converting privies and earth-closets was then being considered and that the Council was proceeding with the work as quickly as possible, taking the worst cases first. On the 10th April, 1920, the Council caused notices to be served on the plaintiffs under Section 36, of the Public Health Act, 1875, requiring them to provide sufficient water-closets for four houses belonging to the plaintiffs in Westfield Lane South Elmsall in the place of the existing privies which the Council had found to be insufficient. On the 24th June, 1920, the General Sanitary Committee passed a resolution requiring the owners of about 74 houses (37 of which situate at Grovethorpe belonged to the plaintiffs) to provide for each house a proper water-closet and sanitary dustbin in place of the existing privy and ash pit which the Council had found to be insufficient. Since the 12th December, 1918, the records of the Council disclose no case in which the Council has actually effected the conversion of a privy into a water-closet under Section 39, of the Act of 1907, or has required a sufficient privy to be provided in place of an insufficient privy or earth-closet."

In addition to the above undisputed facts the plaintiffs relied on two further facts, as to which there was a direct conflict of evidence—namely, first, that at the time of McAllister's reports the privy middens at the four houses in question were in good repair and not in the insanitary condition described by the reports, and secondly, that at a certain interview which took place on April 21, 1920, between McAllister and Captain Addy, a director of the plaintiff company, McAllister made certain admissions that a general scheme for conversion of all the privies in the district into

water-closets (whether sufficient or insufficient) at the owners' expense existed and that McAllister's reports were made in furtherance of such a general scheme. But as to those alleged admissions the learned judge found on the evidence of the witnesses that Mr. McAllister made no such admissions.

It was also proved at the trial that the officers of the Council and most of the members of the Council individually held private opinions of their own in favour of the water-closet system.

The plaintiffs further alleged and evidence was given to prove that if any of the privies was a nuisance, which they denied, the nuisance was caused by neglect of their statutory duty by the Council to cleanse the privies and ashpits and that such nuisance was also caused by the emptying of slops into the privies, which it was also the duty of the Council to prevent.

The material sections relied upon were ss. 36, 41, of the Public Health Act, 1875, and s. 39 of the Public Health Acts Amendment Act, 1907. (1)

(1) Public Health Act, 1875, s. 36: "If a house within the district of a local authority appears to such authority by the report of their surveyor or inspector of nuisances to be without a sufficient water-closet earth-closet or privy and an ashpit furnished with proper doors and coverings, the local authority shall, by written notice, require the owner or occupier of the house, within a reasonable time therein specified, to provide a sufficient water-closet earth-closet or privy and an ashpit furnished as aforesaid, or either of them, as the case may require.

"If such notice is not complied with, the local authority may . . . . do the work thereby required to be done, and may recover in a summary manner from the owner the expenses incurred by them in so doing. . . . ."

Sect. 41: "On the written application of any person to a local authority, stating that any drain water-closet earth-closet privy ashpit or cesspool on or belonging to any premises within their district is a nuisance . . . . the local authority may . . . . enter such premises . . . . and cause the ground to be opened, and examine such drain water-closet earth-closet privy ashpit or cesspool. . . . . If the drain water-closet earth-closet privy ashpit or cesspool . . . . appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice . . . . to be given to the owner or occupier of the premises requiring him . . . . to do the necessary works; and if such notice is not complied with . . . . the local authority may . . . . execute such works, and may recover in a summary manner from the owner the expenses. . . . ."

Public Health Acts Amendment Act, 1907, s. 39, sub-s. 4: "The

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Ward Coldridge K.C., *Maugham K.C.* and *Scholefield* for the plaintiffs. The defendants attempted to bring about a general scheme for the conversion of privies into water-closets by purporting to put in force s. 36 of the Public Health Act, 1875, at the cost of the owners without the Council contributing any part of the expense. The suggestions formulated for submission to the General Sanitary Committee and adopted by the resolutions of December 12 and 26, 1918, show that the Council were determined to bring about such a scheme within their district. The suggestion that the case of a defective privy (whether the defect necessitated structural alteration or not and no matter how it was caused) was to be dealt with under s. 36 brings the case within the principle of *Wood* v. *Widnes Corporation* (1), where it was held to be ultra vires of a local authority to enforce over their district one system which they considered desirable without applying to each particular case the discretion they were bound to apply. The inspector of nuisances was bound to exercise a bona fide judgment in reporting the cases of the four privies in question, and he must satisfy the Court that he had done so before the Court would interfere: *Lewis* v. *Weston-Super-Mare Local Board.* (2) In order to satisfy the words of s. 36, "if a house appear to the authority by the report of their surveyor to be without a sufficient water-closet," it was not enough that the report should be before them, but they must exercise their own judgment on the report: *Margerison* v. *Hind & Co.* (3) The resolution of the Council was in effect an instruction to the inspector to

local authority, where there are a sufficient water supply and sewer, may by written notice to the owner or owners of a building require any existing closet accommodation (other than a water-closet or a slop-closet) provided at or in connection with the building to be altered, so as to be converted into a water-closet or slop-closet." [Then follow provisions enabling the local authority to do the work required if the owner fail to comply with the requirement and providing that in a case where the local authority does the work in respect of any existing closet accommodation one-half of the expenses should be borne by the local authority and the remainder of the expenses by the owner.]

(1) [1898] 1 Q. B. 463.

(2) (1888) 40 Ch. D. 55.

(3) [1922] 1 K. B. 214; 38 Times L. R. 12.

report as "insufficient" under s. 36 any privy which he might find to be defective. The Council might have proceeded in the case of the four privies in question under s. 91 and treated them as "nuisances," or under s. 41 requiring the defendants to do the necessary works for putting the privies into proper condition.

Jenkins K.C., *Romer K.C.* and *Naldrett* for the defendant Council. The requirements of s. 36 were duly complied with, as the report of the inspector was brought to the attention of the Council, from which it clearly appeared that the privies were insufficient; and that threw upon the Council the duty (not a mere power) of issuing the notices. Assuming the right of the Council under s. 36 to require the privies to be replaced by water-closets and the report of the inspector to have been bona fide, the mere fact of the Council having determined beforehand upon a general policy that, whenever they lawfully could, they would in the interest of the public substitute water-closets for privies would (although no doubt it would make the Court more astute to scrutinise the question of the Council's bona fides) not make it ultra vires, provided they judged each case on its own merits and then decided that a water-closet ought to be substituted for a privy.

Upon the construction of s. 36, the Council had that power: *St. Luke's Vestry* v. *Lewis* (1); *Nicholl* v. *Epping Urban Council.* (2) The same section came under consideration in *Wood* v. *Widnes Corporation* (3); but there was no proper discrimination in the particular case before the local authority, and it was a case of an attempt to enforce a general scheme so that where there were defective closets they should be altered to others of a particular type. The decision in *Tinkler* v. *Wandsworth District Board* (4) was based upon the fact that the defendant there claimed the right to enforce a general scheme for the abolition of all privies without exercising a proper discretion in each case; in other words, a general scheme for conversion under s. 39 of the Public

(1) (1862) 26 J. P. 262.
(2) [1899] 1 Ch. 844.
(3) [1898] 1 Q. B. 463.
(4) (1858) 2 De G. & J. 261.

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Health Acts Amendment Act, 1907, which the Act then in force, the 18 & 19 Vict. c. 120, did not enable the local authority to do. When those cases were decided the authority had not the power of requiring a general conversion subsequently conferred by s. 39 of the Act of 1907.

The evidence proves that the inspector had good grounds for reporting insufficiency; if the plaintiffs disputed the insufficiency their remedy was by way of appeal to the Local Government Board under s. 268. Although the resolutions of December 12 and 26, 1918, used the word "defective," they referred to s. 36 of the Act of 1875, and clearly intended "insufficient." The opinion of the Council that the general power conferred by s. 39 of the later Act, should be put into operation whenever they were in a position to do so, has no bearing on the question whether the Council when purporting to act under s. 36 were in effect acting under a general scheme; they properly considered each particular case on its own merits. The evidence proves that the Council did not consider themselves to be tied, nor were they in fact tied, by the resolutions of their predecessors, but had sufficient materials before them on which they exercised a bona fide judgment which enabled them to decide that the proper remedy in the four cases in question was to require the substitution of the water-closet system. As to the charge against the Council that the nuisance was caused by their own neglect in scavenging and enforcing rules against the emptying of slops into the ashpits the language of s. 36 cannot be controlled by any consideration of the causes of the insufficiency.

Maugham K.C. in reply. The privies are not proved by the report to be "insufficient" within s. 36 merely because there are some defects in them. A privy in a bad condition or requiring alteration or amendment within s. 41 is not "insufficient" under s. 36. The report of the inspector was not such a report as the Council were entitled to act upon under the section; he reported the privy as insufficient under s. 36, whereas it was defective under s. 41. Further, he was not a free agent, but made his report under the influence of the Council's resolution. The Council had quasi-judicial functions

to decide whether to act under s. 36 or s. 39, and they put it out of their power to apply the test of demarcation between the two cases by passing resolutions to act under s. 36. Assuming the report good and the Council properly concluded from it that the houses were without sufficient water-closets, it was the duty of the Council in applying the remedy to exercise their discretion with regard to all the circumstances and to consider whether it were fair to throw the whole of the expense upon the owner. Here they did not properly exercise their discretion, because they had fettered it by having predetermined that in every case of insufficiency they would require the substitution of a water-closet. That constitutes a scheme. The Council had a determined policy that in every case of a report under s. 36, they would make an order for a water-closet, and their requirement was ultra vires within the principle of *Wood* v. *Widnes Corporation*. (1) The evidence shows that in recent times there has not been a single case when the Council has ever required privies to be amended or made an order to abate a nuisance when a privy has been full of water from improper use.

The right to appeal under s. 268 of the Public Health Act, 1875, only arises after the work has been done and is in regard to the expenses. (2)

1922. Feb. 15. P. O. LAWRENCE J. [after stating the facts and the grounds of the plaintiffs' contention as set forth above]. Before dealing with the evidence I will state what I conceive to be the effect of s. 36 of the Act of 1875 as to which there has been some discussion. In the first place a local authority cannot act under that section in any case, unless it has before it a report of its surveyor or inspector of nuisances, which report must be of such a nature as to enable the authority in each case to determine whether the house in question is or is not without a sufficient convenience (to use a comprehensive term). In the next place it must appear to the authority by such report that the house is without a sufficient convenience.

(1) [1898] 1 Q. B. 463.
(2) *Rex* v. *Local Government Board; Ex parte Thorp* (1914) 79 J. P. 248.

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Therefore, although the surveyor or sanitary inspector is to report, it is for the authority to determine upon such report whether the house is or is not without a sufficient convenience. When the authority has arrived at the conclusion that the house is without a sufficient convenience, the authority is bound by written notice to require the owner or occupier of the house within a reasonable time to provide a sufficient convenience. In the case of *Nicholl* v. *Epping Urban Council* (1), Stirling J. held that the authority had power under this section, upon being satisfied that a house was without a sufficient convenience and that the circumstances of the particular case required another kind of convenience, to require the owner to provide a sufficient water-closet in the place of an existing privy. It is admitted by the plaintiffs that I ought to follow this case, which has stood unchallenged for upwards of 20 years, even if my opinion were adverse to that of the learned judge who decided it, which it is not. The plaintiffs, however, reserve the right to challenge this decision in the event of an appeal. Then Mr. Maugham has raised a point as to the meaning of the expression "without a sufficient water closet etc." in the section. He contends that this expression does not include a house where there is a defective convenience which could be dealt with under s. 41, or under ss. 94 to 96. I have not been referred to any case in which such a construction has been adopted, or even suggested, although the expression is one which has been used and acted on for a great number of years, and in my opinion the suggested construction is too narrow. No doubt, if the convenience is structurally perfect and is only unusable or in an insanitary condition owing to some temporary cause, I do not think that the house which it serves could properly be said to be without a sufficient convenience within the meaning of s. 36—for example, in the case of a privy where the midden is so full as to render the privy incapable of use. Again if there be only some minor mechanical or even structural defect, which could be easily remedied, I do not think that it could properly be said

(1) [1899] 1 Ch. 844.

that the house is without a sufficient convenience—for example, in the case of a water-closet where the handle operating the flushing apparatus had become detached and merely required re-fastening. In my opinion every case must be judged according to its special circumstances, and where some structural defect in the convenience is found to exist it is a matter of degree as to whether the defect operates to constitute the house a house without a sufficient convenience within the true meaning of the section. Without attempting to give an exhaustive definition of the expression, I think that I am safe in holding that it is wide enough to include a case where the convenience has become structurally defective and insanitary to such an extent that it requires some substantial structural work to be executed in order to render it again fit for use. In my judgment the powers of the authority under s. 36 and those under ss. 41 and 94–96 are cumulative and not mutually exclusive. The authority might well be justified in dealing with a case under ss. 94 and 96 although it also came within the express provisions of s. 41. Similarly there seems to me to be no reason why a case which might be dealt with under s. 41 or under ss. 94–96 should not also come within the scope of s. 36 and be dealt with under that section. For these reasons I am of opinion that the expression includes a case where there is found to exist such a state of facts as was disclosed by Mr. McAllister's reports, assuming of course that the reports were genuine. Ordinarily this Court ought not to act as a Court of Appeal from the report of the surveyor or inspector or from the determination of the authority under s. 36, and in my opinion it should never do so in a case where the only question is whether the surveyor or inspector (acting bona fide) has come to a right conclusion on the facts as reported by him or whether the authority (acting bona fide) has come to a right determination that the house was without a sufficient convenience. These are matters which can and ought to be dealt with on an appeal to the Local Government Board under s. 268, when the authority has done the work and is seeking to recover the expense it has incurred from the owner. In the present case I allowed the plaintiffs to adduce

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evidence as to the actual condition of the privies in question (notwithstanding that Mr. Jenkins, on behalf of the Council, objected to the admissibility of such evidence) because such evidence was vital to the plaintiffs' contention that Mr. McAllister's reports were not genuine reports and that the resolutions of the Council were not bona fide. As the result of the evidence given on this point I find as a fact that the foundations and three or four bottom courses of the brickwork of the privy midden at Nos. 38 and 39 King Street and also the foundations and a similar number of courses of the brickwork of the privy midden at Nos. 185 and 186 Queen Street were at the date of Mr. McAllister's inspection saturated with sewage which was leaking in one case towards the house and in the other case into the back street. I further find that, in order to render the privies and middens sanitary, it is necessary to pull down the existing middens and rebuild them, replacing the contaminated soil with fresh soil. The evidence has also established that the floors of the middens are some inches below the level of the ground (which is contrary to the Council's by-laws) and that the inside walls of the middens are unlined. In the result I find that Mr. McAllister's reports were in accordance with the facts and that they fairly described the condition of the privy middens. I also find that Mr. McAllister was not induced or inspired to make these reports by the Council either for the purpose of enabling it to bring about the conversion of the privies in question into water-closets or in fact. Mr. McAllister made his inspection and reports in the present case solely in consequence of the complaints which he had received that the privies were causing a nuisance, and I find as a fact that, having inspected them and having found them in the condition described, he honestly believed that they were insufficient within the meaning of s. 36, and that the best remedy in the circumstances of these particular cases was to substitute water-closets for the insufficient privies, and that his recommendation to the Council to adopt that course was in accordance with his own bona fide opinion. Mr. Maugham said that he did not charge Mr. McAllister with

deliberate bad faith, but said that he was in a subordinate position, paid by the Council, liable to be dismissed, anxious to please, and had been given so strong and clear a line as to what the Council expected from him that he was not free to make an unbiased report ever since February, 1919, when the conversion of the Ryhill privies was not persevered with.

In my judgment there is no foundation in fact for any of these suggestions. Having heard the evidence I have no hesitation in finding as a fact that there never was any attempt on the part of the Council directly or indirectly to instruct, induce, inspire, or get Mr. McAllister to make any reports with the object of furthering the alleged scheme or with any other object, and that Mr. McAllister in fact never was inspired or influenced by any conduct of the Council or by any fear of losing his position or by any desire to please the Council to make biased reports. In the result I hold that Mr. McAllister's reports were genuine and honest reports made by him in the proper discharge of his duty as inspector of nuisances and not from any collateral motive. That being so, it follows in my judgment that the Council could properly act upon these reports, and further (on the assumption that my view of the construction of s. 36 is right) that the Council was justified in coming to the conclusion that the houses 38 and 39 King Street and 185 and 186 Queen Street were without sufficient accommodation within the meaning of the section. I further hold on the evidence that the Council arrived at this conclusion bona fide after duly considering the circumstances attending each of the two cases and not from any desire to improperly procure the conversion of the privies into water-closets at the expense of the plaintiffs or from any other motive, except that of carrying out its duty as the local sanitary authority in reference to the particular houses under consideration. These findings dispose of the first of the two main points made by the plaintiffs and render it unnecessary for me to decide whether, as alleged by the plaintiffs, the Council did ever in fact form a scheme to utilise s. 36 improperly in order to obtain the conversion of privies

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(whether sufficient or insufficient) into water-closets at the owner's expense.

Having heard the whole of the evidence relied upon in support of this alleged scheme, however, I think it is right that I should express the conclusions I have come to on such evidence. [His Lordship then dealt with the evidence given by Mr. McAllister and other witnesses as to what took place at the interview on April 21, 1920, between Mr. McAllister and others and expressed his opinion that no admission was made by Mr. McAllister that he made his report in furtherance of a general scheme for conversion, as alleged by the plaintiffs, and then proceeded:] The only other evidence relied upon by the plaintiffs in support of the alleged improper scheme consists of the resolution of December 12, 1918, and of the subsequent resolutions of the Council. In my judgment these resolutions are wholly insufficient to establish that the Council entered into any such dishonest scheme as alleged. At the utmost they afford some prima facie evidence that the Council had come to a fixed determination to require owners to provide water-closets wherever privies were found to be insufficient, which fact, if proved, has a direct bearing on the other branch of the plaintiffs' case. I therefore propose to deal with what I consider to be the true effect of these resolutions more in detail later on. In the result I hold that the plaintiffs have entirely failed to make out that the Council ever formed any such improper scheme as alleged.

This brings me to the plaintiffs' second main contention—namely, that the Council did not exercise a proper discretion in requiring the plaintiffs to provide water-closets at 38 and 39 King Street and 185 and 186 Queen Street in place of the existing insufficient privies. The plaintiffs allege that the Council made this requirement in pursuance of the general scheme which was embodied in the resolution of December 12, 1918, and without considering whether the exigencies of the particular four houses demanded that water-closets rather than new privies or earth-closets should be provided there. The plaintiffs

further contend that this general scheme was ultra vires the Council in at least two respects—namely, first because it provided for the substitution of water-closets for privies in all cases which were brought under s. 36, and, secondly, because it purports by the use of the word "defective" to provide for dealing with cases under s. 36 which do not really come under that section. I will deal with the latter point first. It was suggested that the use of the word "defective" instead of the word "insufficient" in the resolution of December 12, 1918, showed that the Council was intentionally using a wider expression in order that cases where the privies could not properly be said to be insufficient should be brought under s. 36. I am of opinion that there is no foundation for this suggestion. It is, I think, quite plain that both the officers who made the suggestions and the Council who accepted them treated the word "defective" to mean "so defective as to be insufficient under s. 36." I do not think that there was any attempt on the part of the Council to embody in the scheme a provision to misuse the powers conferred on it by s. 36. With regard to the other point it is contended that the Council had no power to fetter its discretion by providing in the scheme that water-closets should be provided in all cases of insufficient privies where water and sewer facilities were available. The plaintiffs say that the Council must exercise an unfettered discretion in each case and that the attempt to lay down a hard-and-fast general rule of that kind makes the scheme bad. The cases relied upon by the plaintiffs in support of this part of the case are *Tinkler* v. *Wandsworth District Board* (1) and *Wood* v. *Widnes Corporation.* (2) In the former the authority had determined that all the privies in its district (whether sufficient or insufficient) should be converted into water-closets, which, as the law then stood, it had no power to do; and in the latter the authority had determined that a particular type of water-closet should be adopted, which determination was clearly beyond its powers. I am of opinion that Lord

(1) 2 De G. & J. 261. (2) [1898] 1 Q. B. 463.

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Halsbury's judgment in *Wood* v. *Widnes Corporation* (1) must be read as applying solely to the particular facts of that case. Before considering whether the particular provision in question in the present case was ultra vires I would point out that since the cases of *Tinkler* v. *Wandsworth District Board* (2) and *Wood* v. *Widnes Corporation* (1) were decided the Public Health Amendment Act, 1907, has been passed and that there is nothing unlawful at the present day in an authority embarking upon a general scheme for conversion of privies into water-closets in a district in which this Act is in force provided that water and sewer facilities are available and provided that in carrying out such scheme the authority does not misuse any of its statutory powers. Moreover not only have the powers of local authorities been extended, but great strides have been made in medical science on questions of public health. According to the evidence in this case, it is now recognized by medical experts that every privy midden may become a source of danger not only to the health of the occupants of the house which it serves, but also to the health of the occupants of the neighbouring houses, because the common house-fly acts as a disease carrier and because the midden may be used by persons who although apparently healthy are chronic carriers of typhoid and other dangerous germs which are excreted by them. In these circumstances it is not surprising to find that the medical experts on both sides are agreed that wherever possible it is better to have water-closets in the place of privies. Coming now to the scheme outlined in the resolution of December 12, 1918, it is to be observed that it was carefully framed with due regard to the provisions of the Acts of 1875 and 1907. It was a comprehensive scheme instigated by the Council's medical and sanitary officers and designed to obtain the conversion of all privies in the district into water-closets wherever water and sewer facilities were available. It deals with three classes of houses—namely, first, with houses where the privy accommodation is insufficient; secondly, with houses

(1) [1898] 1 Q. B. 463. (2) 2 De G. & J. 261.

where the privy accommodation is inadequate; and thirdly, with houses where the privy accommodation is both sufficient and adequate. The Council had power to deal with all three classes of houses in the manner proposed, and I hold that the resolution was passed in good faith. It is said, however, that the Council had no power to adopt a scheme containing a general provision that water-closets would be required in place of existing privies which were found to be insufficient under s. 36 of the Act of 1875. In the circumstances of this case I have come to the conclusion that there can be no valid objection to such a provision. It appears that the Council had taken a census of the privies in the district, and in the absence of any evidence to the contrary, there is, I think, good ground for the inference that the Council and its officers were well acquainted with the class of houses which had privy accommodation. Further it is not unreasonable to assume that the circumstances of those houses did not differ widely inter se. Moreover the provision was confined to houses where a public water supply and drainage facilities existed, and was obviously intended by the Council's medical and sanitary officers (who had had a considerable experience of the requirements of the district) not only to remedy and guard against the recurrence of the insufficiency but also to terminate the constant menace to the health of the occupants of the houses resulting from a continuance of the privy accommodation. In these circumstances it would, I think, be strange if the Council could not properly declare its intention to require a water-closet in every case where an existing privy was found after proper investigation to be insufficient and where water and sewer facilities were available. Such a declaration of policy (though of course not binding the Council, if in any particular case it saw fit to depart from it) was not only sound according to the present-day knowledge of what was essential in the interests of public health, but was also eminently fair to owners, who would know what was likely to happen if they let their privies become insufficient. In the result I have come to the conclusion that the scheme

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of December 12, 1918, was both intra vires and unobjectionable and consequently that *Tinkler* v. *Wandsworth District Board* (1) and *Wood* v. *Widnes Corporation* (2) are distinguishable from the present on that ground alone.

There is, however, a further essential particular in which the facts of this case differ from the facts in both those two cases. In both those cases it was held that the notices had been served upon the owner in pursuance of the general scheme without regard to the exigencies of the particular case. On the facts of this case I have come to the conclusion that the notices of September 7, 1920, were not served in pursuance of the scheme of December 12, 1918, or of any other general scheme. This point is already to a great extent covered by my findings of fact on the plaintiffs' first main contention. There are, however, certain additional facts upon this part of the case which are most material. The Council which adopted the resolution of December 12, 1918, went out of office in April, 1919, before it had had an opportunity of carrying out the scheme except possibly to the extent of passing the resolution of February 6, 1919. A new Council was elected in April, 1919, and this Council unfortunately did not see its way to carry out the scheme which its predecessor had passed, as in order to carry it into effect a considerable expenditure would have to be incurred. Mr. Nicholson (the chairman of the Council) explained that as the rates were already too high (ranging from 22*s.* to 28*s.* in the pound during the last few years) it was impracticable, however desirable, to raise money to carry out the scheme. This I think amply accounts for the fact that the resolution of February 6, 1919, was not followed up, and that the recommendation of the inspector as to the privies at 1 to 10 Blundell Road was not adopted. The plaintiffs, however, strenuously contend that in spite of the oral testimony to the contrary, the numerous resolutions passed by the new Council for conversion under s. 36 show conclusively that the new Council did adopt and act upon the scheme, at all events so far as it dealt with the first class

(1) 2 De G. & J. 261. (2) [1898] 1 Q. B. 463.

of houses therein mentioned, or that the Council adopted and acted upon some other general scheme so far as regards this class of houses. The plaintiffs say that the fact that the Council dealt with such a large number of houses under s. 36 and that in every case the owner was required to provide a water-closet, coupled with the fact that no case was dealt with under s. 39 of the Act of 1907, leads to the irresistible inference that in all those cases the Council required the owners to provide water-closets either in pursuance of the scheme of December 12, 1918, or in pursuance of some other general scheme, and in either case without considering whether the exigencies of each particular case required the substitution of a water-closet for the existing privy. On the evidence given in this case I am unable to draw any such inference. In none of the cases to which my attention has been called has it been shown that the Council acted in pursuance of any such general scheme or that the Council did not properly exercise its discretion having regard to the exigencies of each particular case. Regard being had to the large number of houses in the district which have privy accommodation, presumably of a similar type and construction to that with which the present case is concerned, the cases dealt with by the Council during the years 1919 and 1920 do not strike me as excessive. Moreover, after hearing the evidence in this case, I am by no means surprised to learn that the Council on one occasion was compelled to deal with as many as seventy-four cases at the same time. As all the houses dealt with during the period were evidently of the same class, and situated in the same kind of surroundings as the houses the subject matter of this action, I can well understand the Council's requirements in those cases, and I consider that there is no justification for the inference that the Council did not exercise a proper discretion in each of these cases. Further, I desire to repeat that I find no evidence to support the suggestion made by the plaintiffs, that the Council and its officers in dealing with all these houses under s. 36 were not acting bona fide, but were condemning houses wholesale under that section in order

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to carry out an improper scheme to procure conversion at the owners' expense, and I decline to draw any inference to that effect.

Two further questions remain to be considered—namely, first, whether, in view of the undoubted fact that the officers and most, if not all, of the members of the Council held the bona fide opinion that it was for the benefit, not only of the occupier of each house served by a privy, but also of the district as a whole, that, wherever practicable, water-closet accommodation should supersede the privy accommodation, the Council as a body was prevented from exercising a proper discretion in each case, and secondly, whether the Council did in fact exercise a proper discretion in the present case. Mr. Maugham has argued that the Council must in every case exercise its unfettered discretion on the question whether in the circumstances of that particular case the owner ought to be required to provide a water-closet in place of an existing insufficient privy, and that the doctrine applicable to persons exercising judicial functions is applicable to the Council when exercising its discretion in this respect. I agree that the Council must exercise its proper discretion in deciding whether in any given case a new kind of convenience is required, and in doing so must have regard to the circumstances of the particular case; but I do not think that the doctrine as to the exercise of an unfettered discretion in cases like the present ought to be pushed too far. It is no doubt wholly wrong for a judge or for any other person exercising strictly judicial functions to form or express an opinion upon any question he has to decide before he has heard the facts and what the parties have to say, but this doctrine does not in my opinion apply to its full extent to the Council when exercising its discretion as to the kind of convenience to be provided under s. 36. Much less does it apply to each constituent member of the Council, who when seeking election is almost bound to express his opinion upon local topics, one of which in the present case seems to have been the abolition of all privies in the district. It could hardly be that the fact that the majority of the members of the Council had pledged

themselves to their constituents to do what they could to get the privies and middens abolished, would prevent the Council as a body from exercising a proper discretion when it came to consider the facts in any particular case. The common-sense point of view, in my opinion, is that any member of such an authority as the Council is entitled to hold and express an opinion upon any question of public interest, but that when a particular case, in respect of which the Council as a body has to exercise a discretion on the facts, comes to be considered, the members present at the meeting must acquaint themselves with and duly consider all material facts relating to the case before voting as to the manner in which the discretion should be exercised by the Council. If that is done, it seems to me that the discretion is well exercised notwithstanding that the majority of the members of the Council are predisposed to take a particular view. Nor do I think that the fact that the Council's medical and sanitary officers had formed a decided opinion that privies ought wherever possible to be abolished, and that the members of the Council, in making up their minds upon the particular cases before them, were guided to a great extent by the opinion of these officers, debars the Council from exercising a proper discretion on the question whether the owner should be required in any particular case to provide water-closet accommodation. It is inconceivable that any competent medical officer or inspector of nuisances should not form an opinion on this question, and express such opinion whenever the occasion demanded it; it would be strange if this fact were to preclude the Council from acting on his advice in a particular case.

In the result, I am of opinion, that nothing that has been proved to have taken place in this case, has had the effect of rendering the Council incapable of exercising a proper discretion in the particular cases with which this action is concerned or in any other cases which have already or may hereafter come before it.

The question then arises whether the Council did in fact exercise a proper discretion when requiring the plaintiffs to provide sufficient water-closets for 38 and 39 King Street

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and 185 and 186 Queen Street. The evidence clearly establishes that all the relevant facts to enable a proper discretion to be exercised were before the General Sanitary Committee on July 22, 1920, and also before the Council on August 5, 1920. The circumstances respecting the privies at these particular houses were discussed and considered, and Mr. McAllister at the meeting of July 22, 1920, in response to an inquiry by one of the members of the Council, gave his reasons for recommending the substitution of water-closets instead of the retention and repair of the existing privies in these particular cases. In these circumstances I hold as a matter of fact that not only have the plaintiffs failed to prove that the Council did not exercise a proper discretion in these cases (and I think the onus was upon them to prove that no such discretion was exercised), but that the evidence has established affirmatively that the Council did exercise a proper discretion in these particular cases. It was suggested on behalf of the plaintiffs that the Council in arriving at its decision in the present case did not take the position of the plaintiffs as owners of the houses, or the cost to which they would be put in complying with the Council's requirements, into consideration at all. Mr. Maugham, however, frankly admitted that the plaintiffs were not greatly concerned at the cost of providing the new water-closets at 38 and 39 King Street and 185 and 186 Queen Street, but that they were chiefly concerned at the large expenditure which they would have to incur if (as they believed would happen) the Council were to take the same course with regard to the rest of their houses in the district. The answer to these suggestions in my judgment is, in the first place, that on the facts it is not true to say that the Council did not consider the position of the plaintiffs. The Council knew that the plaintiffs were the owners of the four houses with which it was dealing, it also knew that the plaintiffs owned a great number of other houses in the district, and it further knew that the plaintiffs had strongly objected to some of their other houses having been dealt with under s. 36, on the ground that the cost of providing water-closets would fall wholly

upon them. Moreover the cost to the plaintiffs of providing water-closets as compared with the cost of repairing the privies in the present case was referred to at the meeting on July 22, 1920. The conclusion of fact at which I have arrived on this point is that the position of the plaintiffs was known to the members of the Council when they were discussing the recommendation of the inspector, and that it is not proved that they did not give due weight to this aspect of the question. In my opinion the fact that the plaintiffs own a large number of other houses in the district with privy accommodation, if it ought to carry any weight at all, which I very much doubt, is certainly not one which of itself would render the decision which the Council in fact arrived at perverse. It is true that as the Council has decided in favour of conversion in the present case, it is not unlikely that it will arrive at the same decision in other cases where the circumstances are similar; but in my judgment that fact does not prevent the Council from requiring water-closets in the present cases if in its discretion it considers that it is proper that this kind of convenience should be provided. If the plaintiffs wish to avoid the risk of being required to provide water-closets for their other houses at their own expense, they have the remedy in their own hands. They can keep their privies in proper repair and sanitary condition, and if the Council were at any time to require the plaintiffs to provide a water-closet in the place of an existing privy which is not insufficient within the meaning of s. 36, the plaintiffs could refuse to comply with such requirement, and on the Council seeking to enforce payment for the new convenience, could appeal to the Local Government Board under s. 268. In the result I hold that neither *Tinkler* v. *Wandsworth District Board* (1) nor *Wood* v. *Widnes Corporation* (2) has any application to the facts of this case, which differ essentially from the facts of those cases in three respects, namely: (1.) no ultra vires general scheme is proved to have existed in fact; (2.) if such an ultra vires scheme did ever exist the notices of

(1) 2 De G. & J. 261. (2) [1898] 1 Q. B. 463.

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September 7, 1920, were not served in pursuance of it; and (3.) it is proved that the Council considered the exigencies of the particular cases and exercised a proper discretion with respect to those cases.

One further point was taken by the plaintiffs. They contend that the Court ought to restrain the Council from exercising its powers under s. 36 in this case, because the condition in which the middens at Nos. 38 and 39 King Street and Nos. 185 and 186 Queen Street were found was directly due to the default of the Council itself in two respects—namely, first, in permitting and even encouraging the occupiers of these houses to pour household slops into the middens and, secondly, in not scavenging the middens sufficiently often. In my judgment even if the Council had been guilty of neglect in these respects, this fact would not justify the Court in restraining the Council from acting under the powers conferred upon it by s. 36. In my opinion the test under that section is sufficiency or insufficiency of accommodation in fact, and it is immaterial to inquire what is the cause which has brought about the insufficiency. If the Council had wilfully and maliciously rendered the middens insufficient, other considerations would of course arise, but mere neglect to perform an obligation cast upon the Council by some other provisions of the Act, does not in my opinion furnish a valid ground for an injunction to restrain the Council from exercising its powers under s. 36. It is, however, in my judgment unnecessary to pursue this point, because the evidence has altogether failed to establish that the Council have been guilty of any neglect of duty in respect of either of the matters alleged. As regards the emptying of slops into the middens, it appears from the evidence to be the practice of many of the occupiers of houses in this district to empty their slops into their privy middens, and although there is no direct evidence that this was done by the occupiers either of Nos. 38 and 39 King Street or of Nos. 185 and 186 Queen Street, I think that the proper inference to be drawn from the evidence is that the practice was adopted by the occupiers of all these four houses. In so far as bedroom slops (consisting of urine not infrequently

accompanied by excreta) are concerned, it is in my judgment proper that these should be emptied into the middens, as it would cause a nuisance to empty them down the gullies under the kitchen windows. As regards household slops (consisting chiefly of waste water after it has been used for ordinary domestic purposes) the Council has passed by-laws forbidding these to be emptied into the middens and has from time to time done its best to enforce such by-laws by prosecuting offenders and by causing notices to be affixed to the walls of the middens warning the occupiers against this practice and threatening penalties. It is however obvious that the Council's servants cannot keep a constant watch on the occupiers of all these houses and are therefore unable to check the practice to any appreciable extent. It is almost certain that whatever steps might be taken to prevent it, the occupiers would continue to adopt the quicker and easier method of pouring the slops into the midden, rather than the slower and more laborious method of pouring them down the comparatively small opening provided by the surface gully in the back yard. The conclusion I have come to is that there is no foundation whatever for the suggestion that the Council has encouraged this abuse of the middens, but on the contrary that it has adopted all reasonable means of checking it, in spite of which however I am convinced that the abuse will continue so long as the midden privies themselves continue. It might even be said that of the two parties to this action, the plaintiffs as owners are in a better position to prevent their tenants from damaging the landlords' privies by such an abuse of the middens. However that may be, it is proved that the middens must, even if they are used in a strictly proper manner, receive a considerable amount of liquid, which, unless and until absorbed by the ashes, will remain in the bottom of the midden, and will in time soak into the brickwork if it is not properly lined, and the case of *St. Luke's Vestry* v. *Lewis* (1) shows that the Council may properly take the likelihood of the recurrence of a nuisance into consideration

(1) 26 J. P. 262.

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when deciding whether a water-closet is not the best remedy. As to the scavenging, the evidence has satisfied me that, although the Council during the war encountered a difficulty in finding sufficient labour to carry out this work properly, yet, since that difficulty has been removed, it has performed its duty of scavenging the middens regularly and efficiently. The evidence has also satisfied me that the irregularity of scavenging during the war has neither caused nor contributed to the insanitary condition of the middens at Nos. 38 and 39 King Street and Nos. 185 and 186 Queen Street. The occupants of this class of houses are accustomed to receive a large quantity of cheap coal, yielding a considerable percentage of ashes which are emptied into the middens, and the more ashes are so emptied the greater is the proportion of absorbent material in the midden. The result of insufficient scavenging therefore, although it may have caused the middens at times to be so full as to be useless, was not to cause or to contribute to the soakage of liquid through the walls. The Council's practice is to scavenge the middens once a fortnight in summer and once every three weeks in winter, and it was suggested that the danger from the flies could be greatly minimised, if not overcome altogether, if the middens were scavenged more frequently, as the period which elapses from the laying of the egg to the final emergence of the fly from the pupal case was about nine days. From my very superficial knowledge of the life history of the house-fly and its metamorphoses, I doubt very much whether the period of nine days mentioned by Dr. Kay is not far too short, especially under the conditions ordinarily prevailing at these middens. Be that as it may, however, it is impossible to suppose that the scavenging, even if done most carefully, would result in the removal of all the eggs, larvæ, and pupæ of the house-fly. Besides which, it is the adult fly which is the disease carrier, and there will always be sufficient flies in and about these houses in the summer to make the privy midden, with its opening opposite to and only a few feet away from the kitchen window, a source of danger to the health of the occupants of the house.

I have now dealt with all the points which were raised before me and, having come to the conclusion that the plaintiffs have failed to make out their case, I dismiss the action with costs.

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Solicitors for the plaintiffs: *Hancock & Willis, for Wake & Sons, Sheffield.*

Solicitors for the defendants: *Corbin, Greener & Cook, for Raley & Son, Barnsley.*

H. C. H.

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In re CAMPBELL'S TRUSTS.

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March 2, 3.

[1921. C. 1991.]

Will—Settlement—Special Power of Appointment—Assignments upon the Trusts of the Will—Fund accumulated on like Trusts—Separate Settlors—Accretion or independent Settlements—Appointment for Life of Income of Trust Funds.

The testator devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert the same and stand possessed of the residue upon trust for his sons equally. He directed his trustees to retain the share of each upon trust for the son for life, and after his death upon trust for his issue, as he should by deed or will appoint, and in default of appointment, equally, but with the proviso contained in a hotchpot clause. The testator empowered his sons by deed or will to appoint to their respective wives all or any part (not exceeding one-third part) of the income of their respective shares in his residuary estate. The gifts to the sons were expressly declared to be conditional on each of them on attaining the age of twenty-one assigning to the trustees of the testator's will their interests under his marriage settlement "to be held upon the like trusts and with and subject to the like powers and provisions declared concerning the share for the same son" in the testator's residuary estate. All the sons complied with this condition and assigned their interests. By a memorandum of direction and a deed poll the sons directed the trustees to hold the share of each of them in a sum which represented surplus income "as an addition to the capital" of their respective shares, and "so as to follow the destination thereof," and be subject to the same trusts, but with one exception. There were thus three trust funds, the residuary, the assigned, and the surplus income fund. In the exercise of the power of appointment one son appointed to his wife for life the income from his share of the

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testator's residuary estate, and a second son made a similar appointment of one-third of the income of his share, "including in such share" the share under the testator's marriage settlement which he had assigned to the trustees of the will:—

Held, that the assigned and surplus income funds were not an accretion to the testator's residuary estate, and that therefore the appointment of a share in the income from the residuary fund did not carry with it the shares in the income of the two other funds. That the assignments, the memorandum of direction, and the deed poll were separate settlements of separate funds, with different settlors, and that each must be treated as a separate settlement in which were written out the referential trusts therein referred to; and that therefore the appointment by the second son of his share of the assigned funds was good, and there was no general hotchpot clause.

ORIGINATING SUMMONS.

By his will the testator, Henry Alexander Campbell, devised and bequeathed all his real and personal estate to trustees upon trust to sell and convert the same into money and stand possessed of the residue upon trust for his five sons who should attain the age of twenty-one years, equally. The testator directed his trustees to retain the share of each son upon trust for the son for life and after his death upon trust for his issue as he should by deed or will appoint and in default of appointment amongst his son's children equally who being male should attain the age of twenty-one years, or being female should attain that age or marry. In the event of any son of the testator dying and leaving no son who should attain the age of twenty-one years, or no daughter who should attain that age, or marry, the testator directed that the capital and income of that son's share should accrue to his brothers equally, the accruing share to be held on the trusts of the original share.

Then there was the following proviso: "Provided always that no child of my same son who or whose issue shall take any part of the same trust premises under any appointment in pursuance of the power herein contained shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the same trust premises without bringing the share or shares appointed to him or her or his or her issue into hotchpot and accounting for the same accordingly." The testator also provided that in the

event of any of his sons becoming bankrupt, an outlaw, or a Roman Catholic different trusts regarding his residuary estate should come into operation. In the events that happened that provision never came into force.

After empowering his sons by deed or will to appoint all or any part (not exceeding one-third part) of the income of their original or accruing shares in his residuary estate to their respective widows for life, the testator declared that these gifts to his sons were on the express condition that each son on attaining the age of twenty-one assigned his interest in the trust funds and property subject to the testator's marriage settlement to the trustees of the will to be held "upon the like trusts and with and subject to the like powers and provisions as are therein declared and contained concerning the share therein provided for the same son" in the testator's residuary estate.

The testator died on January 17, 1906, leaving five sons, Rawdon, Claude, Gerald, Eric, and Harold.

On August 27, 1906, Rawdon, Claude, and Gerald, in accordance with the provision of the testator's will, assigned to the trustees of the will their respective interests under the testator's marriage settlement to be held upon the aforesaid trusts. Eric similarly assigned his interest on April 8, 1907, and Harold on April 20, 1909.

The sons having assented to a proposal of the trustees that as the income was derived from commercial investments yielding fluctuating dividends it would be advisable to pay each son 2000*l.* a year and accumulate the surplus until the sum of 50,000*l.* was obtained, a memorandum of direction, dated November 29, 1907, was signed by the five sons (by Harold in 1909 on his attaining his majority) in which they admitted that 5500*l.* London County 3½ per cent. Consolidated Stock represented the surplus income from the trust funds retained by the trustees, and directed the trustees to accumulate the income of the stock until the sum of 50,000*l.* was attained and "to hold the share of each of us the undersigned as an addition to the capital of our respective shares under the said will in the testator's residuary estate and

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so as to follow the destination thereof and to be subject to the same trusts powers and provisions (including the provision for accruer) as are therein contained concerning the same except that in lieu of the trusts therein contained of the income of such shares" the income of their respective shares in the accumulated fund was to be paid to each of them during their respective lives. The result was the sons took an absolute interest in this new fund free from any of the fetters as to bankruptcy or religion that the testator had imposed with regard to his residuary estate. The memorandum also provided that in the event of the trustees realizing certain investments in commercial undertakings (which they did before August, 1911) they might at their discretion cease to accumulate, although the sum of 50,000*l.* had not been reached.

By a deed poll dated August 1, 1911, the five sons admitted that the sums of stock and cash specified in the schedule thereto represented surplus income which had arisen from the trust funds held by the original trustees upon the trusts declared by the testator concerning his residuary estate, with the addition of the accumulations of the income of the investments of such surplus income, requested that the accumulations should cease, and directed the trustees to hold the share of each of them in that fund, amounting to 23,370*l.* in London County 3½ per cent. Stock, on the same trusts as were set out in the memorandum of direction. Claude died in 1916, leaving a widow, a son, and two daughters. Eric died in 1920, leaving a widow, two sons, and a daughter.

In 1917 the Public Trustee was appointed trustee in place of an original trustee. The last original trustee died in 1919, and the Public Trustee is now sole trustee.

Eric by his will, purporting to exercise the power of appointment given him by his father's will, declared: "I therefore hereby direct limit and appoint that the income to be derived after my death from my original and accruing share or shares in the residuary trust moneys and in the investments thereof or so much thereof as I may have power to appoint shall from and immediately after my death be paid to my wife for the term of her life." Claude by his will, purporting to exercise

the power of appointment given him by his father's will, after reciting that he had, by the indenture of August 27, 1906, assigned to the trustees of his father's will his share under his father's marriage settlement, declared: "Now in exercise of the powers for this purpose given to me by the will of my father and by the said indenture of August 27, 1906, and of any other power enabling me in this behalf I hereby direct and appoint that one equal third part of the income of my original and accruing share or shares in the residuary trust moneys for the time being subject to the trusts of my father's said will and in the investments or property representing the same including in such share or shares my share or shares so assigned by me as aforesaid in the trust funds and property which were comprised in or subject to the trusts of the said settlement executed on the marriage of my father and mother shall after my death be paid to my wife for life," and subject thereto he made a similar appointment in favour of his children.

On April 28, 1921, this summons was taken out by the trustee to determine whether the appointments in the wills of Eric and Claude to their respective widows extended to the income of their settled shares, both original and accruing, in the funds comprised in, or subject to the trusts of, (*a*) the three assignments dated August 27, 1906, April 8, 1907, and April 20, 1909, and (*b*) the memorandum of direction of November 29, 1907, and the deed poll of August 1, 1911; and secondly whether the appointment in the will of Claude to his children included his original and accruing shares in the aforesaid funds, and, if such shares were not included, how the provision for hotchpot was to be applied.

R. W. Turnbull for the trustee.

J. E. Harman for the widow of Eric Campbell. The testator stipulated as a condition of his sons taking a share of his residuary estate that they should assign to the trustees of his will their respective shares under his marriage settlement to be held "upon the like trusts and with and subject to the like powers and provisions" declared concerning his residuary

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estate. By these words the testator augments his residuary estate by the assigned shares.

Under the memorandum of direction and the deed poll the trustees of the will hold the shares of the testator's sons in the fund of 23,370*l.* "as an addition to the capital of our respective shares under the said will in the testator's residuary estate and so as to follow the destination thereof." In the result these three funds are amalgamated and the appointment in Eric's will operates over all three, and all the trusts of the testator's residuary estate, including the hotchpot clause, apply to the amalgamated fund: *In re Fraser* (1); *In re Cavendish* (2); *In re Beaumont* (3); *In re Marke Wood.* (4)

Since the power is to appoint an amount not greater than a certain proportion of the income of the property charged therewith, the testator by the addition of property to be held on the same trusts has in fact increased the total amount of income of which the maximum annual charge is not to exceed a certain aliquot part: per Lord Selborne in *Cooper* v. *Macdonald.* (5)

Assuming the appointment by Eric does not extend to his share of the income of the 23,370*l.*, yet as the effect of the testator's will was to make the assigned share an accretion to the funds originally settled, and not to create a new settlement with referential trusts as in *Trew* v. *Perpetual Trustee Co.* (6), the appointment by Eric extends to his share of both: *In re Paul's Settlement Trusts.* (7)

Cecil Turner for the widow and son of Claude. Claude's share in the fund of accumulated income arose from his original share in the residuary estate of his father and by the direction of November 29, 1907, and the deed poll of August 1, 1911, was expressly directed to be "an addition to the capital of it," and therefore Claude's appointments in his will operate on both funds: *Eustace* v. *Robinson.* (8) Even if the words of the will only apply to Claude's original share

(1) [1913] 2 Ch. 224, 232.
(2) [1912] 1 Ch. 794.
(3) [1913] 1 Ch. 325.
(4) [1913] 1 Ch. 303.
(5) (1873] L. R. 16 Eq. 258.
(6) [1895] A. C. 264.
(7) [1920] 1 Ch. 99.
(8) (1880) 7 L. R. Ir. 83.

yet, as the accumulated income is directed "to follow the destination" of the share, the appointment carries with it in favour of the appointees the accumulated income: *Liddell* v. *Liddell*. (1) The share of the accumulated income was an accretion merely arising out of, and added to the original share given to him by his father's will and therefore required no specific reference to it in Claude's will: *In re Paul's Settlement Trusts*. (2) Claude's share under his father's marriage settlement was assigned by him upon the like trusts as were by his father's will declared concerning his share of residue. The assignment created a new settlement with referential trusts of an independent fund, which was specifically referred to and appointed by Claude in his will. The appointment operates over the three funds.

Wilfrid Hunt for the remaining three sons of the testator, and the two daughters of Claude. The appointment by Eric only extends to one-third of the testator's residuary estate, strictly so called. Eric only purports to appoint over the residuary estate, strictly so called. In the other funds the trusts as to life interests are different, the settlors are different from the settlor of the residuary estate, and different death duties would be payable. The three funds cannot be treated as alike for all purposes. The decision in *In re Paul's Settlement Trusts* (2) was based on the view that s. 24 of the Wills Act, 1837, applied. In that case there was the same settlor of both funds, the deed of settlement and the will were of even date, and the case was decided on the special language used. The testator declared: "The trusts and powers of the settlement are to take effect in relation to the property in all respects as if it had formed part of the property originally settled." Here the assignments, the memorandum of direction, and the deed poll are separate settlements with different settlors. If that were not so an assignee or mortgagee of a share in the testator's residuary estate could claim to share in the other funds. Even if the appointment by Claude to his wife of his share in the funds assigned to the trustees of the testator's will is good under

(1) (1896) 74 L. T. 105. (2) [1920] 1 Ch. 99.

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the referential trusts, the appointment cannot include his share of the accumulated fund, because in that case there was a new settlement, new settlors, and the trusts were only up to a point the same as those declared concerning the testator's residuary estate.

RUSSELL J. This is a summons to determine the operation and effect of certain appointments contained in the wills of Eric Campbell and Claude Campbell, who were two of the sons of the testator, Henry Alexander Campbell. [His Lordship stated the facts and decided that by the words "appoint all or any part (not exceeding one-third) of the income" of their respective shares, the testator only empowered his sons to appoint one-third of that income.] The first question is whether, under the appointment made by Eric, his wife is entitled to a life interest in Eric's share in the residuary estate of the testator only, or whether she is entitled in addition to a life interest in any, and which, of the funds assigned by the three documents of assignment, or in the fund subject to the trusts of the memorandum of direction and the deed poll. It has been argued that she is entitled to an interest in all the funds, because the effect of the documents is to make one aggregate fund, that all the funds are to be treated as being part of the testator's residuary estate, and that therefore when Eric appoints to his wife a life interest in the residuary estate under his father's will that carries with it an appointment of a life interest in the funds which have been added to, and which are to be treated as one fund with, the residuary estate. That really involves the proposition that there is only one fund and one power of appointment, and that if you exercise that power over the residuary estate of the testator, you exercise it also over the funds which are to be treated as an accretion to the residuary estate. In support of that proposition various authorities were cited to me.

The point as a rule arises where one fund, or more than one fund, is settled by reference to the trusts of another fund, and, more often than not, in connection with the liability

to bring the funds into hotchpot when the question is whether they are to be treated as subject to one common hotchpot clause, or whether each fund is to be treated as having a separate hotchpot clause. That is one form in which the point often comes before the Court. Another form is when a fund is settled by reference to the trusts of another fund, and in the originally settled fund there is a power of charging, and the question arises whether the referential trusts of the second fund operate so as to multiply or increase the power of charging. Those are the most usual forms in which the question comes before the Court.

The question which I have to decide is whether an appointment, which is in terms confined to the residuary estate passing under the testator's will, operates so as to give the wife a life interest in funds settled upon similar trusts to those affecting the testator's residuary estate. *Cooper* v. *Macdonald* (1) does not really assist me in this case at all. The decision there was, where two funds were settled by the same instrument, and the beneficiary under the first fund had power to appoint a third of the income of that fund in favour of her husband, that she had a similar power over a third of the income of the fund settled by reference. That was a case where two funds were settled by the same instrument, and the power given in respect of the first settled fund was not a power to charge a fixed amount but an aliquot share. The learned judge came to the conclusion that there was no reason why the power to appoint an aliquot share should not equally apply to the trust funds settled by reference. The next case cited was *Trew* v. *Perpetual Trustee Co.* (2) The decision was that where there were two funds, one fund settled by reference to another in the same instrument, there was in that particular case, no increase or multiplication of charge. In that case the testator gave to his widow the interest on 20,000*l.* during widowhood, and on remarriage the interest on 10,000*l.* during her life, the interest on the balance of the 20,000*l.* in that event to be for the benefit

(1) L. R. 16 Eq. 258. (2) [1895] A. C. 264, 267.

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of their children; "and as to all his residuary estate" he gave it upon the same trusts as were declared in regard to the 20,000*l.* The widow married again. Until her remarriage she was obviously entitled to the income of the 20,000*l.*, and also to the income of the residuary estate. When she remarried her interest in the 20,000*l.* was cut down by half, but she still claimed to have an interest in the residuary estate and to be entitled, either to a moiety of the residuary estate for her life, or to the income of an additional 10,000*l.* out of the residuary estate. The case is useful, because Lord Hobhouse, who delivered the judgment of the Board, apparently adopted the view of the learned judge in the Court below as to the method of construing referential trusts. His words are these: "Upon the literal construction the argument pressed in favour of the appellant is, to use the words of Manning J., that where there is a trust by reference 'the only safe course to adopt is to rewrite the words declaring such trust, merely substituting the second fund or property for the first.' Then it said that if the words 'residue of my estate' be written in where the words '20,000*l.*' occur, that will carry to the widow the income of the sum of 10,000*l.* on her remarriage. But in the first place their Lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges." Apart from that apparently the view of Manning J. was approved.

The next case cited was *In re Cavendish* (1), a decision of Parker J., where, although the two funds were settled by the same instrument, the learned judge came to the conclusion that they were to be treated as distinct funds for the purposes of hotchpot. *In re Beaumont* (2), a decision of Farwell L.J., sitting as a judge of first instance, was a case where the funds were settled by separate instruments. In that case he held that a power to a person to appoint to herself 2000*l.* of the original trust fund applied to the fund settled by reference to the trusts of the original fund; in other words that was an

(1) [1912] 1 Ch. 794. (2) [1913] 1 Ch. 325.

instance where, there being separate instruments, the learned judge applied the terms of the referential trust strictly, although it resulted in a multiplication of charges. In that particular case the facts were such that, although the wife was able under the referential trusts of the second instrument to appoint 2000*l.* to herself, it was caught at once by a clause in the first instrument, by which she was bound to settle it upon the trusts of the first instrument. The decision is interesting, because it shows that in a case where there were two instruments the learned judge gave effect to the trusts written out at length in the second instrument, although the result was to multiply the power of charging.

In the case of *In re Marke Wood* (1), a decision of Neville J., there was again only one instrument, and it was held that the different parts were not subject to a common hotchpot clause, but that there were independent trusts each having its own hotchpot clause. Finally in *In re Fraser* (2) Sargant J. was dealing again with a case where the funds were settled by one instrument, but upon the construction of that document he came to the conclusion that there was a common hotchpot clause to be treated as applicable to all the funds, and, as he points out, after considering various authorities, the question depends upon whether the second set of words which settles the additional fund is a separate settlement upon the trusts of the original fund. The learned judge is dealing only with a case where the settlement of the second fund is in the same instrument as that of the first fund. He says: "Is the second set of words which settles the additional fund really a separate settlement of the additional fund upon the like trusts as the first or original fund, the words being merely words of reference so as to operate by way of compendious introduction of the earlier trusts, or does the second set of words operate as an amalgamation of the second fund with the first fund so as to make it an augmentation of or accretion to the first fund? In the former case prima facie it would seem proper to introduce into the trusts of the second fund a hotchpot clause which was limited to that fund, just as the

(1) [1913] 1 Ch. 303. (2) [1913] 2 Ch. 224, 232.

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original hotchpot clause was limited to the original fund." That is to say he is going to write out the trusts at length. "But in the latter case it prima facie seems proper to treat the whole of the trusts of the original fund, including the hotchpot clause, as being applicable to the amalgamated or augmented fund, by virtue of the amalgamation, or augmentation, or accretion that has been directed." Then he points out, in regard to referential trusts in general, that where there are two instruments the case is very much stronger for writing out the clauses separately than where there is only one instrument. Those are the authorities which have been cited, with the exception of one, a decision of P. O. Lawrence J., to which I shall refer later, and it will be observed that in no instance in the case of separate instruments, at separate dates, and with separate settlors, has the fund ever been treated as one aggregate fund, either for the purpose of hotchpot, or as regards multiplication of charges, or for any other purpose. It seems to me that is the kind of case I have to consider here. The father settled his residuary estate upon his sons in shares. He provided in his will effectively for a similar settlement by his sons of the shares which they took under the testator's marriage settlement. But although he so provided in his will effectively, the carrying out of the testator's request that his sons should settle their shares under his marriage settlement, or the fulfilment by the sons of that condition of the father, appears to me to be none the less a disposition by them of the shares which they took under that marriage settlement. The three assignments by the sons on August 27, 1906, April 8, 1907, and April 20, 1909, are separate settlements, by separate settlors at different times, the trusts of which are declared by reference to the trusts contained in the testator's will with regard to his residuary estate.

The next question is whether Eric by his will appointed a life interest in any of those funds to his wife. In my opinion he did not. The appointment in Eric's will is confined, and purports to be confined, to an appointment of the share, given to him under his father's will, in his father's residuary estate: "Whereas my late father Henry Alexander Campbell by his

will declared that it should be lawful for each of his sons at any time by any deed revocable or irrevocable or by will to appoint that all or any part (not exceeding one-third part) of the income of his original or accruing share or shares "—in what ?—in the residuary trust moneys therein-before mentioned and in the investments thereof, "should after his death be paid to his wife for life or for any less period and upon such conditions and with such restrictions (if any) as he should think fit." That is the recital. Now I come to the operative part: "Now it is my desire and intention to exercise the power so as aforesaid given to me by the will of my said late father to the full extent permitted by the terms thereof "—that is, by the terms of his father's will—" and I therefore hereby direct limit and appoint that the income to be derived after my death from my original and accruing share or shares in the said residuary trust moneys "—that is, the said residuary trust moneys referred to in my father's will before he gave me this power to appoint: " and in the investments thereof or so much thereof as I may have power to appoint shall from and immediately after my death be paid to my wife for the term of her life." Eric's will only refers to the residuary estate of his father, and only purports to exercise the power of appointment given by his father's will. I am asked to read Eric's will as if it referred to funds not mentioned in his will at all, but created by other people at different times. The will cannot be so read without in effect making a new will and that I am not entitled to do. All that Eric by his will purports to do is to exercise the power of appointment, given him by his father's will, over his father's residuary estate, strictly so called. The result is that no life interest is given to the widow in any of the funds comprised in the three assignments. I will refer in a moment to the deed poll and the memorandum of direction.

Then as regards Claude's will the same class of question arises: His will is more elaborate. He recites that under the will of his father " one equal fifth share of my father's residuary estate is settled upon certain trusts for my benefit during my life and after my death for all or any of my issue born during

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my life, and under the trusts and directions contained in the said will a further share or shares in the said residuary moneys may in certain events accrue to the share so settled as aforesaid, and my father declared that it should be lawful for each of his sons to appoint that all or any part (not exceeding one-third part) of his original or accruing share or shares in the residuary moneys aforesaid and in the investments thereof should after his death be paid to his wife." Up to this point Claude has referred to nothing except the original or accruing shares in his father's residuary estate. He then recites that by an indenture of August 27, 1906, in compliance with a condition in that behalf contained in his father's will, he assigned his interest under his parents' marriage settlement to the trustees of his father's will, upon the like trusts and subject to the like powers and provisions as were in the same will declared and contained concerning the share of residue provided for him. So now he has brought into this document a reference to the other fund which was assigned by him under the indenture. Then he recites his own marriage settlement for the purpose of showing that under that settlement he had provided income for his wife up to 400*l.* a year, out of his share of his father's residuary estate, and out of the share assigned by him by the indenture of August 27, 1906. [His Lordship read the clause in Claude's will appointing a life interest to his wife.] So when Claude appoints to his wife a life interest in one-third of the income, and when he appoints the corpus in favour of his children, he confines the appointment to his share of his father's residuary estate, and includes in that share the share in his father's marriage settlement assigned by him. In the one case he purports to exercise the power of appointment given him by his father's will, and in the other case the power of appointment referentially given him by the indenture of August 27, 1906. The result is that in my opinion Claude's will only operates to give his widow a life interest as regards his original and accruing shares of his father's residuary estate, and the share of the marriage settlement funds assigned by him. The remaining question is whether by the will of Eric, or Claude, a life interest is given in the

fund created under the memorandum of direction of November 29, 1907, and the deed poll of August 1, 1911. In my opinion, upon the true construction of these wills, neither Eric nor Claude purported to exercise the power given to them by the memorandum of direction and the deed poll, and their widows could only succeed in claiming such an interest if Mr. Turner's argument, which was also put forward by Mr. Harman, were right. That argument was as follows: That, by virtue of the express language used in the memorandum of direction and in the deed poll, the trusts were that the funds thereby settled were to be treated as an addition to the corpus of the share of the residuary estate, and to follow its destination, and that therefore an effective appointment of a life interest in the residuary estate crystallises the trusts upon which, under the memorandum of direction and the deed poll, the funds, the subject of the trusts, are to be held. The effect would be that the wife would not take a life interest in those funds under an appointment in her favour in her husband's will, but would take it as a cestui que trust under the memorandum of direction and the deed poll, by reason of the fact that in the events that had happened she was a cestui que trust for life in regard to the residuary estate. That is a somewhat startling proposition. It really amounts to this, that an assignee of a cestui que trust under the trusts of the will, in regard to the residuary estate, could claim to be a cestui que trust under the memorandum of direction and the deed poll. It would also have the result that although, under the memorandum of direction and the deed poll, the trust funds subject to their operation are to be subject to the same trusts and powers as were contained in the will concerning the residuary estate, yet they would not be subject to a power of appointment, because the whole of this argument depends on the fact that the power of appointment given by the will, and exercised in respect of the residuary estate, crystallises the trusts upon which the trust funds are to be held under the memorandum of direction and the deed poll, and, although the memorandum of direction and the deed poll fund are settled by reference to the trusts of the

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residuary estate, it would not be open to one of the sons to appoint the residuary estate one way and the deed poll fund another.

That would be an extraordinary result, which I do not think I should bring about unless I am driven to so do by the terms of the memorandum of direction and the deed poll. The words, no doubt, up to a point, are strong. In each document they are the same. The share is to be held "as an addition to the capital of our respective shares under the will in the testator's residuary estate and so as to follow the destination thereof and to be subject to the same trusts powers and provisions (including the provision for accruer) as are therein contained concerning the same except that" the income of their respective shares in the fund should be paid to each during their respective lives. That is an alteration of the trusts and therefore it seems to me that the document is declaring something which is not, and cannot be, a fact, when it declares that these funds are to be amalgamated. They cannot be amalgamated, because the trusts are different. It appears to me that I must treat the funds settled by the memorandum of direction and the deed poll as being separate funds, settled by different settlors, at different times, and held upon separate trusts from those contained in the father's will concerning his residuary estate, notwithstanding that the documents purport to treat them as if they were to be blended in one fund. It is said that I ought to hold that these funds have been amalgamated because of a decision of P. O. Lawrence J. in the case of *In re Paul's Settlement Trusts.* (1) In that case a Mr. Paul on August 11, 1910, made a voluntary settlement of certain securities upon his daughter Ann Bridgett, who was then a widow, and after her death upon trust for her children, or remoter issue, as she should by deed or will appoint, and in default of appointment in favour of certain persons. The settlement also contained a power for Ann Bridgett by deed or will to appoint unto or for the benefit of any husband of hers who might survive her an interest during his

(1) [1920] 1 Ch. 99.

widowhood. On the same day Mr. Paul made his will, and, by clause 10, bequeathed 20,000*l.* to the persons who at his death should be the trustees of the settlement of August 11, 1910, to be held "upon the trusts and with and subject to the powers and provisions by and in such settlement declared and contained concerning the property thereby settled or such of the same trusts powers and provisions as may be then subsisting and so that such trusts powers and provisions shall take effect in relation to the said sum of 20,000*l.* in the same manner in all respects as far as the case will admit as if such sum had formed part of the property originally settled by such indenture." The testator died in 1917, Ann Bridgett married a Mr. Nelson, and died in 1918, without issue. By her will, which was made in 1912, after her marriage to Mr. Nelson, she recited that under the settlement she had power "to appoint to my said husband an interest during his widowhood in any part of the trust fund thereby settled not exceeding one-half part thereof to commence after my decease. Now therefore in exercise of the said power of appointment and of all other powers (if any) enabling me in that behalf I hereby direct and appoint that in the event of my said husband surviving me the trustees for the time being of the said settlement shall from and after my death stand possessed of the said trust fund upon trust to pay the income of one-half part thereof to my said husband. . . . ."

Mr. Paul died before his daughter, but the will she had made before he died was the effective will. The question arose as to whether the husband, by virtue of Mr. Paul's will, was entitled not only to one-half the income of the original settlement funds, but also to an interest during widowhood in a moiety of the 20,000*l.* It was held by P. O. Lawrence J. that he was so entitled and apparently on two grounds. The first ground was that under the special words of Mr. Paul's will by which he directed the 20,000*l.* to be treated as if it were part of the fund originally settled, the legacy was to be held upon the same trusts as the funds originally settled were then being held, that is, he

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came to the conclusion that Mr. Paul's will was in effect a direction that the trustees were to hold the 20,000*l.* upon whatever trusts were effective at the time as regards the original settled fund. The second ground was that by virtue of the Wills Act, 1837, s. 24, the daughter's will was to be taken as referring to the whole trust fund at that time. On one of these two grounds he decided in favour of the husband. I do not find anything like such strong words in this case so as to warrant me in coming to the conclusion that the funds subject to the memorandum of direction and the deed poll are to be treated as one with the shares of the residuary estate under the testator's will, so that the beneficiaries under the latter must necessarily be treated as the beneficiaries under the former.

In my opinion the three assignments, the memorandum of direction, and the deed poll, are really separate settlements of separate funds, at distinct times, and by distinct settlors, and each settlement must be treated as a separate settlement in which by reference are written out the referential trusts therein referred to. Consequently the only life interest that passes to Eric's wife is one in respect of his share of his father's residuary estate, while Claude's wife takes a life interest in respect of Claude's share of his father's residuary estate, and the share assigned by Claude under the indenture of August 27, 1906. Also the appointment in the will of Claude to his children only applies to his share of his father's residuary estate and the share assigned by him. It follows from this that there is no general hotchpot, but that each fund is subject to a separate hotchpot clause.

Solicitors: *Pennington & Son; McLeod, Eyre, Dowling & Co.; Walters & Co.*

J. B. B. M.

In re TAYLOR.

TAYLOR *v.* TWEEDIE.

[1921. T. 1378.]

PETERSON J.

1922

Jan. 11, 12, 13;
Feb. 23, 24.

Will—Bequest—"The money I have and am entitled to now and at any future time"—No enlarging Context—Not a residuary Gift—Extent of Gift—Debenture Stock—War Loan—Interest.

A bequest of "the money I have and am entitled to now and at any future time" preceded by a specific bequest of furniture (which lapsed) and of a plate chest, but not followed by any further disposition, or extended by any other context, in the will:—

Held, not to be a gift of the testatrix's residuary personal estate, but to be confined to money which the testatrix had or was entitled to, whether represented by cash in hand or at the bank, or by debts payable either presently or at some definite future date.

Lowe v. *Thomas* (1854) Kay, 369; 5 D. M. & G. 315 applied.

In re Cadogan (1883) 25 Ch. D. 154 not followed.

Held, also, that debenture stock, whether irredeemable or redeemable only at the option of the company, and the interest thereon, which was in the nature of an annuity, were not covered by the bequest, but

Held, further, that War Loan 4*l.* 10*s.* per cent. 1925/45, and debenture stock and debenture bonds, all of which involved a definite obligation for repayment on or before a fixed date, together with the intermediate interest payable thereon, which was in the nature of interest on a loan, were covered by the bequest.

ADJOURNED SUMMONS.

The will, dated December 22, 1909, of Jessie Alison Taylor, revoked all former wills, appointed the plaintiffs executors, directed payment of all her debts and funeral expenses as soon as convenient after her decease, and then proceeded as follows: "I give and bequeath unto Mrs. Sandeman wife of Col. J. E. Sandeman residing at Richmond all the furniture left to me by my husband now lying in Taylor's Depository and to her daughter Mrs. Molteno the plate chest and the contents thereof also at Taylor's Depository To William F. Duncan Taylor of 9 Cavendish Road Blundell Sands I bequeath one third of the money I have and am entitled to now and at any future time To my four cousins Winifred Lilian Muriel and Eirene . . . . and to Betty (Elizabeth) Wright (my god-daughter) . . . . I bequeath the remaining two thirds

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of my money including the money I have now and that which I am entitled to now or at any future time." The will contained no further disposition by the testatrix.

The testatrix died on January 21, 1921, and her will, which consisted of a printed form filled in by her, was duly proved by the plaintiffs. Mrs. Sandeman predeceased the testatrix.

The testatrix died possessed of stocks, shares and securities to the value of nearly 16,000*l.*; cash in the house and an uncashed money order for a total of 8*l.* 9*s.* 2*d.*; 821*l.* 17*s.* 7*d.* cash at the West Brighton branch, and 2272*l.* 4*s.* 1*d.* cash at the Hanover Square branch, of the London County Westminster and Parr's Bank; a sum of 21*l.* 11*s.* 6*d.* cash in the hands of some Brighton solicitors; 1000*l.* lent on mortgage of freehold property at Brighton and furniture and personal effects to the value of 798*l.* 15*s.*

The plaintiffs took out this summons, to which Muriel Tweedie one of the legatees named in the will, and the testatrix's sole next of kin were respondents, for the determination of the question whether the word "money" as used by the testatrix included the whole or any and what part of her residuary estate.

Errington for the plaintiffs.

Hughes K.C. and *Cleveland-Stevens* for the defendant legatee. Where, as in this case, there are previous gifts, then a final gift of "all my money" is equivalent to a gift of "all my property"; but where a gift of "money" is followed by subsequent gifts of other personal property, then prima facie "money" does not mean "everything." Here, we submit that "money" covers the whole estate not otherwise disposed of and is equivalent to "property": *In re Cadogan* (1); *Prichard* v. *Prichard* (2); *In re Buller* (3); *In re Skillen* (4); *In re Woolley.* (5) Pecunia, first of all, meant flocks and herds, and only later on came to

(1) 25 Ch. D. 154.
(2) (1870) L. R. 11 Eq. 232.
(3) (1896) 74 L. T. 406.
(4) [1916] 1 Ch. 518.
(5) [1918] 1 Ch. 33.

mean "money." "Money" according to Skeat's Etymological Dictionary comprises "wealth." In *In re Gliddon* (1) there were none of the characteristics of a residuary gift, which we submit are to be found here. There is a preliminary direction to pay debts and funeral and testamentary expenses: *Rogers* v. *Thomas* (2) adopting *Kendall* v. *Kendall* (3); and there are prior gifts followed by a gift of the money the testatrix had and was entitled to then and at any future time, and that, we submit, amounts to a gift of residue.

Manning K.C. and *F. K. Archer* for the next of kin. The dispositions of this will consist of three specific gifts and nothing more. The gift of money is just as specific as the two previous bequests. "Money" unexplained by any context will not pass furniture or property other than cash; and the words "I have and am entitled to now and at any future time" enlarge only the source from which the money may come, and not the meaning of the word. While "money" as used in this will may include debts, it will not include stocks and shares: *Ogle* v. *Knipe.* (4) Without a special context "money" will not be regarded as a residuary gift: *Langdale* v. *Whitfield* (5); *Lowe* v. *Thomas* (6); *Larner* v. *Larner* (7); *In re Gliddon.* (1) In *In re Skillen* (8) and *In re Woolley* (9) there were indications which enlarged the meaning of the word and those decisions do not avail in this case in favour of a residuary gift, although Sargant J. in *In re Skillen* (8) disposed of the argument based on the direction for payment of debts.

The correctness of the decision in *In re Cadogan* (10) has always been doubted, and it is inconsistent with other cases. Stirling J. in *In re Buller* (11) thought it went too far and Sargant J. in *In re Skillen* (8) did not adopt it. In *Prichard* v. *Prichard* (12) the word "principal" money was held to be equivalent to "capital" money. *Waite* v.

(1) [1917] 1 Ch. 174.
(2) (1837) 2 Keen, 8.
(3) (1828) 4 Russ. 360.
(4) (1869) L. R. 8 Eq. 434.
(5) (1858) 4 K. & J. 426.
(6) Kay, 369; 5 D. M. & G. 315.
(7) (1857) 3 Drew. 704.
(8) [1916] 1 Ch. 518.
(9) [1918] 1 Ch. 33.
(10) 25 Ch. D. 154.
(11) 74 L. T. 406.
(12) L. R. 11. Eq. 232.

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Combes (1) was decided before *Lowe* v. *Thomas* (2) and Mr. Hawkins questioned whether it would now be followed: Hawkins on Wills, 2nd ed., p. 66.

Although this gift of money follows previous specific gifts, it is not a residuary gift, and while we admit that it is not confined to cash in the house or at the bank, but would cover money advanced on mortgage or securities, we submit that it does not cover stocks or shares, or residuary personal property, as to which there is an intestacy.

Hughes K.C. in reply referred to *Williams* v. *Williams*. (3)

PETERSON J. The question I have to determine is whether, under the will of Mrs. Taylor, a gift of what Mrs. Taylor describes as "money" is, in effect, a gift of the testatrix's residuary personal estate. [His Lordship stated the will and the facts and continued:] The authorities I think show that, apart from any special context, a gift by the testatrix of her money in a will is a gift which passes only what has been described as "ready money," and does not pass all the testatrix's residuary personal estate. On the other hand, the word "money" may, if the context is sufficient, include the whole of the testatrix's residuary personal estate; as, for instance, where a testator directs payment of his debts, and then gives "all my money that remains after payment of my debts." The context in such a case is sufficient to show that the gift of "money" is, in the particular circumstances of such a will, a gift of the residuary personal estate.

There are a number of authorities some of which are not easily reconciled with others. *Lowe* v. *Thomas* (4), however, is one of the leading cases. The testatrix bequeathed to her brother John Thomas "The whole of my money for his life; at his death to be divided between my two nieces, Rebecca and Mary Lowe; my clothes to be divided likewise between them; my watch and trinkets for my niece Mary Lowe. I likewise declare that the longest survivor of the

(1) (1852) 5 De G. & Sm. 676.
(2) Kay, 369; 5 D. M. & G. 315.
(3) (1878) 8 Ch. D. 789.
(4) Kay, 369, 375.

above mentioned nieces is to become the possessor of the whole money." The testatrix died possessed of bank annuities, a moiety of a sum of Old South Sea annuities, a small sum of cash which was with her sister Mary Lowe, and a very small sum of 2*l.* or 3*l.* in cash in the house, and also a wardrobe, trinkets and a few articles of furniture, and a half-year's dividend on the stocks, which had accrued at the date of her death. Sir W. Page Wood V.-C. said: "Believing that this Court acts upon the rule laid down by Lord Lyndhurst, I have to see what my predecessors have considered to be the ordinary sense which mankind attach to the word 'money' in a will. . . . . However I might differ in my own notion of the ordinary acceptation of the word 'money' in this case, I cannot hold its meaning to be contrary to what judicial decision has determined its ordinary sense to be. . . . . If a person bequeaths 'his money' simply, and not 'the residue of his money after payment of debts,' it has been entirely settled by the decisions in *Hotham* v. *Sutton* (1) and *Gosden* v. *Dotterill* (2), that, by the word 'money,' in such bequests, the testator has not bequeathed his stock in the public funds." If, in such a case, the word "money" included the whole of the residuary personal estate, it obviously would include any stock in the public funds which the testator had to dispose of. In the result the Vice-Chancellor held that the gift by the testator of "the whole of my money" did not pass the annuities. Now, it is quite true that the question there was whether the annuities passed under the gift of "the whole of my money." But the Vice-Chancellor must have come to the conclusion that the gift of the whole of the money was not a gift of the testator's residuary personal estate, for if the gift of the whole of the money was equivalent to the gift of the whole of the testator's residuary personal estate, the necessary result would have been that annuities were included in the gift. That case went to the Court of Appeal (3) and the judgment of the Vice-Chancellor was

(1) (1808) 15 Ves. 319. (2) (1832) 1 My. & K. 56.
(3) 5 D. M. & G. 315, 317, 318.

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affirmed. Knight Bruce L.J., after quoting a passage from Marcellus, said this: "The Vice-Chancellor's conclusion appears to be the just result of an accurate application of that rule, there being here a total absence of context to show that the testatrix employed the word 'money' otherwise than in its correct and proper sense, which is not property generally, but a particular species of property. That species no more includes annuities than houses or furniture." Then he illustrated his meaning in a somewhat characteristic passage: "An annuity is not, though its fruit is, money, nor where a man gives his wool or his apples are we to presume that he means to give his sheep or his orchard. That this lady herself, if she could be appealed to, would not overrule the judgment which I am now giving I am not clear, but the numerous class of persons who, in wills and otherwise, speak as if the office of language were to conceal their thoughts, have no right to complain of being taken to mean what their language expresses." Turner L.J. dealt with the case on a somewhat different basis. He put the question in this way: "Could it be the intention of the testatrix, by those words, to pass the whole of her property? Are they tantamount to a description of the whole of her estate?" Then he observed that it could not have been the intention, because after the disposition of the whole of the testatrix's money, there occurs a disposition of the testatrix's clothes, watch, and trinkets, and that not by way of exception out of the previous disposition of the whole of the money. "It is clear therefore," said the Lord Justice, "that the whole of the residuary estate cannot have been intended to pass under the description of money." Then he considered the question whether, if the gift of the whole of the money did not pass the residuary estate, it was sufficient to pass all property producing income, and in a passage which throws some light on the way in which (in the view of Turner L.J.) the Court ought to approach a question of this kind, he observed: "If we deviate from the correct meaning of the words which the testatrix has used, we are immediately involved in the difficulty of deciding how far the deviation

is to be carried. I think that in this and in other like cases it is necessary to adhere to the proper and correct sense of the words used in the will, where there is no context to give a different effect to them." That case established that the word "money" means "money" in its strict sense, in a will, unless there is a context which is sufficient to show that the testator used the word in a more extended sense.

That case was followed by *Larner* v. *Larner* (1) in which a farmer, after directing the payment of all his just debts and funeral and testamentary expenses by his executors, gave to his wife during her natural life "the interest of all sums of money I may die possessed of, subject to such agreements, if any, which I may enter into in my lifetime; and after her decease I do give all such interest money unto my dear daughter Mary Larner, ... during the term of her natural life, and after her decease then I do give the principal and interest unto my said daughter's child or children, equally between them, share and share alike." Kindersley V.-C. said this: "I think it not improbable that the testator really intended a bequest of his property generally. But there is a well settled rule, that in the absence of anything in the will to indicate a clear intention to the contrary, a gift of 'all my money' must be taken to mean 'money' in the strict sense, and nothing else; you cannot, in the absence of anything in the will showing a different intention, conclude that the testator meant to give more than 'money.' No doubt if you do find anything in the will indicating a different intention, the Court will lay hold of it; and if I could in this will find anything extending the sense of the word 'money,' I should gladly lay hold of it. If, for instance, he had given a direction to pay his debts, and had then said he gave 'all the rest of his monies.' But he has not done so. . . . I am of opinion, that the gift in this will is a specific gift of money; and that there is intestacy as to the residuary property."

In *Langdale* v. *Whitfield* (2) there was in the will a gift of residuary personalty to the plaintiff and by a codicil the

(1) 3 Drew. 704, 707. (2) 4 K. & J. 426, 432.

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testatrix directed that certain legacies should be paid out of any moneys of or to which she might be possessed or entitled at the time of her decease, and gave "all the residue of the moneys of which I may at the time of my decease be absolutely possessed, unto and equally between"—two other persons—"and in all other respects I ratify and confirm my said will." The question was what was included in the word "moneys" in the codicil. The testatrix had left property which was subject to the trusts of a settlement, over which she had a general power of appointment, mortgage debts, bonds, bills, notes, cash in the house and cash at the bankers, and household furniture, and effects.

Sir W. Page Wood V.-C. said: "Now, the authorities have clearly settled, that, prima facie, and in the absence of anything in the will to indicate a different intention, the word 'moneys' will be confined to ready money actually in hand. A different intention may be gathered from the words of the will, and where that is the case, effect will be given to it," and held that while the gift of "moneys of or to which she might be possessed or entitled at the time of her decease" included moneys in hand and moneys due to the testatrix at the time of her decease, it was not a bequest of residuary personalty and did not include furniture and effects.

In *Ogle* v. *Knipe* (1) a testatrix by her will disposed of "all my money and securities for money of every description." She was entitled to Bank of England stock, some shares in a canal company, and various sums secured by mortgage, and the question was what passed under the bequest of "my money and securities for money." Sir W. M. James V.-C. held that the bank stock and canal shares did not pass, but that money in the hands of an agent of the testatrix and sums secured by mortgages to which the testatrix was entitled did pass. It was not apparently argued that the gift was a bequest of residuary personalty, and probably it was considered that this contention was disposed of by *Lowe* v. *Thomas* (2), which was cited. The point cannot

(1) L. R. 8 Eq. 434. (2) Kay, 369.

have been overlooked by the Vice-Chancellor and the fact that he held that part of the personalty did not pass under the bequest shows that in his view the gift was not a residuary bequest.

These cases establish that a gift in a will of "money" is merely a gift of "ready money," unless there is a context which extends the meaning of the word "money," either to the extent that it is equivalent to a gift of the residuary personal estate, or to the extent that while it is something short of a gift of the residuary personal estate, it includes that which is not strictly "ready money."

There are, however, some other cases to which I must refer. In *Prichard* v. *Prichard* (1) the testator had made a short will in these terms: "I appoint Thomas Henry Prichard to be my executor, and I declare that the income arising from my principal money shall be paid to my wife, while unmarried, for the support of herself and the education of my children; and at her death, or on her marriage, to be divided among them. And I desire that my sisters Charlotte and Jeannette, who have so long had the charge of my mother, and have so well learned how to secure her comforts, should still continue to have care of her." The testator left freehold property and a considerable amount of personal property, including a share in two partnerships, household furniture, 239*l.* cash at his bankers, shares, debts, and a leasehold house. Malins V.-C. came to the conclusion that the whole of the personal property passed, including the leasehold, but not the freehold property—in other words, that the gift of "my principal money," was a gift of residuary personalty. The Vice-Chancellor, after commenting on the fact that the testator had little money, strictly so called, although he had a large personal estate, and observing that the testator had a wife and six children, for whom he was providing, and that the testator therefore intended "to bequeath capital sufficient to provide an income capable of supporting his wife and educating his children, which could not be done out of the property falling within the strict

(1) L. R. 11 Eq. 232, 234.

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meaning of money," which, as I have pointed out, was only 239*l.*, went on to say: "If he had said the income from all his property or his estate, there would have been no difficulty;"—that of course would be a gift of residue—"and in using the words 'principal money' I think he intended to signify all his capital; that is, he meant a universal disposition of all his money's worth." The Vice-Chancellor in that case held that "principal money" meant "capital" and that a gift of "capital" was a gift of the testator's personal estate. It does not seem to me that that case is of any assistance on the present occasion.

In re Cadogan (1), however, stands on a somewhat different footing. The will was in these terms: "I leave one-half of the money of which I am possessed to my sister Honoria Frances Cadogan, and the remainder"—that is the remainder of the money—"to be divided equally between my sisters Olivia . . . . and Sophia . . . . and after them to their children." When the testatrix died, she had 270*l.* at the bank, about 5000*l.* in various investments, a share in some leasehold houses, a share of the proceeds of the sale of a freehold house, which was subject to a trust for sale, and some furniture and effects valued at 121*l.* 15*s.* 6*d.* Kay J. came to the conclusion that the word "money" in that will covered the whole of the personal estate. He appears to have arrived at the view that "money" in that case was used in the popular sense, not in consequence of any context, but because it was extremely improbable that the testatrix, when she made her will two days before her death, really intended only to dispose of the comparatively small sum of cash at the bank.

In re Cadogan (1) has been subjected to comment by Stirling J. in *In re Buller*. (2) *In re Buller* (2) was a case in which the testatrix left all her money, except the sum of 400*l.* invested in the Belgravia Dairy Company, to her nephew, and her godchild, in equal shares, and dealt with what she described as the money in the Belgravia Dairy Company. The Belgravia Dairy Company was a company in which the testatrix

(1) 25 Ch. D. 154. (2) 74 L. T. 406.

had shares, and the learned judge came, I think, inevitably to the conclusion that the gift of all her money, except the sum of 400*l.* invested in the Belgravia Dairy Company, was a gift of residuary personalty, because the exception of the shares in the Belgravia Dairy Company from the gift of money showed that the testatrix did not consider that the meaning of the word " money " was restricted to ready money. The learned judge observed that the word " money " is generally used in a limited sense as equivalent to " cash," but that the authorities showed that the word may be read in a much wider sense. Then he referred to the case of *In re Cadogan* (1), in which Kay J. had said that " there should be no absolute technical meaning given to such a word as ' money ' in a will, but that its meaning in every case must depend upon the context, if there is any, which can explain it, and upon those surrounding circumstances, which the Court is bound to take into consideration in determining the construction." Stirling J. then said this : " Kay J. therefore came to the conclusion that the word ' money ' even without a context might pass personal estate. That is very strong, and I am not sure that I am prepared to go to such a great length as that, but I am clearly of opinion that the word ' money ' would pass any personal estate, if the context showed that such were the intention of the testator."

In re Cadogan (1) was also referred to by Sargant J. in the case of *In re Skillen.* (2) Those who maintain that the gift in the present case is a gift of residuary personalty relied upon the decision in *In re Skillen* (2), but I think that, on examination, it will appear that *In re Skillen* (2) was one of those cases in which there was a special context which, in the view of the learned judge, showed that the testator was using the word " money " in a very much wider sense than that of " ready money." The testatrix in *In re Skillen* (2), after directing that her just debts and funeral and testamentary expenses should be paid, gave to her two nieces, Alison and Ellen, " my money to be equally divided between the two said nieces after 20*l.* is paid to my executor,

(1) 25 Ch. D. 154, 157. (2) [1916] 1 Ch. 518, 521.

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and I wish all my personal property in the house of either of my two nieces Alison and Ellen at the time of my death for them to have for their own." The question was whether the residuary personalty passed under that gift. The learned judge came to the conclusion that the direction that "all my personal property in the house of either of my two nieces" should be held by them "for their own," was a qualification of a more extensive previous gift, so as to raise an implication that property of the kind to which the qualification extended had already been dealt with by the will, and therefore held that the gift of "money" included all the testatrix's personal estate. This decision turned upon the special context. The learned judge referred to *In re Cadogan* (1) in the following passage: "It may perhaps be doubtful on the cases whether the term 'money' alone and without the aid of any context is sufficient to pass the whole personal estate. For the decision to that effect of Kay J. in *In re Cadogan* (1) has been doubted by Stirling J. in *In re Buller*. (2) But it is clear that a comparatively slight context one way or the other may either restrict the term 'money' within comparatively narrow limits or may assist it so as clearly to include the whole personal estate or the residue of the personal estate." As illustrations of this proposition he referred to *Legge* v. *Asgill* (3); *In re Buller* (2); and *Lowe* v. *Thomas*. (4)

The last case of this description is *In re Woolley* (5) before Eve J. The testator in that case bequeathed to his niece: "Those monies invested in the British North Borneo Company, and in the Monterey Light and Power Company, and any other monies which I may possess and not mentioned in this will, and not herein otherwise disposed of." The learned judge held that, the word "monies" covered the personal estate. That case, as appears in the judgment, turned upon the context. The use of the word "other" in connection with "monies invested in the British North Borneo Company

(1) 25 Ch. D. 154.
(2) 74 L. T. 406, 409.
(3) (1823) T. & R. 265n.
(4) 5 D. M. & G. 315.
(5) [1918] 1 Ch. 33.

and the Monterey Light and Power Company," showed that the testator intended to include in the word "monies" investments in limited companies, and consequently the word "monies" could not be interpreted in the limited sense.

In *In re Gliddon* (1) Younger J. followed *Lowe* v. *Thomas* (2), which he held to be indistinguishable from it. But the learned judge stated the question which he had to answer in this way: "The question is whether there is in this will a sufficient context to enable me to attribute to the words 'all my monies' used by the testatrix a signification comprehensive enough to carry the whole residuary estate."

The true view on the authorities being, as I understand, that "money" is to be treated in the strict sense unless there be a context which shows something to the contrary, I now turn to this will.

The testatrix, after directing that her debts and funeral expenses should be paid, gave the furniture left by her husband then lying in Taylor's Depository to one person and a plate chest and the contents thereof to another. She then bequeathed "one third of the money I have and am entitled to now and at any future time" to a Mr. Taylor, and the other two thirds to five other persons.

In this will, "money," in order to pass the residuary personal estate, would have to include any furniture and effects which were not in the depository, and the furniture and effects comprised in the gift of furniture which lapsed as well as the testatrix's personal effects. Prima facie the word "money" would not be sufficient for the purpose of passing these effects. There is nothing to show that "money" was meant to include chairs and tables. The gift is not, as in some of the cases, a bequest of any of my "other" moneys. If "money" in this case meant "personal estate" there would be a bequest of furniture and a bequest of the plate chest followed by a gift of all the personal estate. In terms it would be a gift of all the personal estate, although part of the personal estate had already been disposed of. In *Lowe* v. *Thomas* (2) Turner L.J. expressed the view that the gift of

(1) [1917] 1 Ch. 174, 177. (2) 5 D. M. & G. 315.

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" the whole of my money " could not mean the " whole of my property," because it was followed by a disposition of some specific articles which were part of the testator's property. It appears to me that a similar argument is applicable where, as in this case, there is a gift of specific articles followed by a bequest of a testator's money ; for this, if money meant all the personal estate, would amount to a gift of part of the personal estate, followed by a gift of all the personal estate. In my view, in this will " money " is not a class of which the furniture and the plate chest are species ; " money " is distinguished from the furniture and other effects, and in substance the testatrix says " while I give my furniture and plate chest to A. and B. I give my money to C. and D."

But it was said that this is not a gift of money, but it is a gift of the money I have and am entitled to now and at any future time ; and that this form of gift is equivalent to a residuary bequest. But these words in my opinion only signify " any money which I have or am entitled to " ; and I am unable to see how the words attached to the word " money " can convert that which otherwise would not be a residuary bequest into a gift of the residuary personalty.

The result then is that, in my opinion, I am unable, with due regard to the authorities to which I have referred, to hold that " money " in this case means the residuary personal estate.

On February 23 and 24 the summons came on again for the determination of further questions which had arisen in consequence of the effect of his Lordship's decision given above.

The estate of the testatrix, besides certain stocks and shares, comprised a sum of 500*l*. War Loan 4*l*. 10*s*. per cent. 1925/45 and also a debenture bond, certain debenture stocks, both redeemable and irredeemable, and rentcharge stocks, all of which were specified in a schedule exhibited and marked S. V. T. 2, which is set out below. The evidence relating to these scheduled securities was to the effect that the debenture stocks, lien stock and rentcharge stocks specified in Part I. of the schedule were irredeemable ; that the debenture stocks

specified in Part II. of the schedule were redeemable only at the option of the respective companies issuing the same; and that the debenture stock and debenture bond specified in Part III. of the schedule were redeemable as to the debenture stock in the year 1987, and as to the debenture bond in the year 1943.

The summons had been amended and now asked whether the word "money" included all or any of the debenture bond, debenture stocks and rentcharge stocks specified in the schedule, which contained the following items :—

S. V. T. 2.

PART I.

£ 300 South Metropolitan Gas Co. Perpetual 3% Debenture Stock.
38 London and North Western Railway Co. 3% Perpetual Debenture Stock.
622 Ditto Ditto
450 London Scottish American Trust, Ld., 4% Perpetual Debenture Stock.
522 North Eastern Railway 3% Irredeemable Debenture Stock.
59 North London Railway 4½% Debenture Stock.
58 Caledonian Railway 4% Debenture Stock.
250 Ditto Ditto
359 Ditto Ditto
750 Great Central Railway 3½% 2nd Debenture Stock.
1239 Great North of Scotland Railway 4% Debenture Stock.
115 Ditto 4% Lien Stock.
59 Great Western Railway 5% Rent Charge Stock.
1032 Ditto Ditto
547 Metropolitan District Railway 3% Consolidated Rentcharge Stock

PART II.

530 Australian Mercantile Land and Finance Co., Ld., 4% Debenture Stock.
150 Metropolitan Trust Co., Ld., 4% Debenture Stock.
230 New Zealand and Australian Land Co., Ld., 4% Debenture Stock.
225 British Investment Trust, Ld., 4% Debenture Stock.
225 Anglo-American Debenture Corporation 4% Debenture Stock.

PART III.

150 Investment Trust Corporation, Ld., Debenture Stock.
200 City of Cape Town 4% Municipal Loan Debenture Bond

Errington for the plaintiffs.

Hughes K.C. and *Cleveland-Stevens* for the defendant legatee. All debentures and debenture stock are debts due to the testatrix and will come within the description of "money I have and am entitled to now and at any future time."

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They are debts charged on the undertaking of the company and payment of arrears of interest can be enforced by the appointment of a receiver: Companies Clauses Act, 1863, ss. 23 and 25. Every payment of interest is money to which the testatrix becomes entitled at a future time. Similar words have been held to include moneys under a policy on the testator's own life: *Petty* v. *Willson* (1); moneys due to the testatrix, whether upon security or otherwise: *Langdale* v. *Whitfield* (2); the reversionary interest of the testator in a mortgage debt: *Wilkes* v. *Collin* (3); sums on deposit at banks: *In re Derbyshire* (4) and in *In re Beavan.* (5) "Securities for money" were held to include consols, promissory notes and railway debenture stocks. The words would at any rate include the interest on the debenture stocks even if the payment of the capital moneys depends upon their being redeemable or irredeemable. The word "I" is not confined to the testatrix, but would include her executors: *Petty* v. *Willson.* (1) The War Loan is repayable before or at a definite time, and is, we submit, covered by the gift.

Manning K.C. and *Archer* for the next of kin. None of the items in Parts I. and II. of the schedule will be included in the gift, because being either irredeemable or redeemable only at the option of the company nothing was owing in respect of them to the testatrix at her death, but we concede that the apportioned interest would pass. That there is no debt in respect of them is clear from James L.J.'s judgment in *Attree* v. *Hawe.* (6) Annuities, or mere periodical payments, do not constitute "money": per Knight Bruce L.J. in *Lowe* v. *Thomas.* (7)

"Money" will not pass the War Loan, which only confers the right to receive an annuity: *Lowe* v. *Thomas* (7), a case of bank annuities and Old South Sea annuities: *Wildman* v. *Wildman* (8); *Kirby* v. *Potter.* (9)

(1) (1869) L. R. 4 Ch. 574.
(2) 4 K. & J. 426.
(3) (1869) L. R. 8 Eq. 338.
(4) [1906] 1 Ch. 135.
(5) (1885) 53 L. T. 245.
(6) (1878) 9 Ch. D. 337, 349.
(7) 5 D. M. & G. 315.
(8) (1803) 9 Ves. 174, 177.
(9) (1799) 4 Ves. 748, 751.

We admit that the securities in Part III. of the schedule, being definitely repayable by a fixed date, are covered by this bequest: *Langdale* v. *Whitfield.* (1)

PETERSON J. The question which I have now to determine relates to three classes of securities. The first class consists of what is known as perpetual debenture stock, that is to say, debenture stock, lien stock, and rentcharge stock, the essence of which is that they are not redeemable; in other words the railway company, or other company, in question accepts a sum of money on the terms that the company shall pay a fixed rate of interest per annum on the amount that has been contributed. In no case does the bargain provide for redemption, optional or compulsory, by the company. The second class comprises debenture stock of various companies, which is redeemable only at the option of the company, that is to say, there is no obligation on the part of the company to pay back the principal money, there is only an obligation on its part to pay interest until such time as in its discretion it chooses to pay back the amount that it has received. In both cases no doubt, if the company were wound up, there would have to be a distribution of the assets, and in such a case the holders of the debenture stock would be entitled to be paid the amounts which had been contributed. But that is a mere possibility. The fact remains that, at the date of this testatrix's death there was no obligation on the part of the companies mentioned in Parts I. and II. of the exhibit, "S. V. T. 2," to pay any portion of the amount represented by the stock to the testatrix. In the case of the perpetual debenture stocks the only right that she had was a right to receive interest for ever at the rate specified. As to the stock which is redeemable at the option of the company, the position was that at the date of the testatrix's death she was entitled to interest at the stipulated rate with this additional right, that if the company at any time elected to pay back the amount that was represented by the stock, the stockholder's right to interest would cease and the

(1) 4 K. & J. 426.

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stockholder would instead receive the amount represented by the stock.

Part III. consists of two items: one is debenture stock of the Investment Trust Corporation, Ld., and the other a City of Cape Town 4 per cent. Municipal Loan Debenture Bond. With reference to the Investment Trust Corporation Debenture Stock, the evidence is that the company is definitely bound to pay the amount represented by it on July 1, 1987. There is a definite obligation in that case on the part of the company to repay the amount represented by the stock. As to the City of Cape Town 4 per cent. Municipal Loan Debenture Bond, the evidence is that these bonds have to be repaid in July, 1943, and that there is a sinking fund which may be employed in the purchase of bonds. There is a definite obligation on the part of the City of Cape Town to repay the amount by 1943. In both those cases it seems clear that there is a definite debt which is payable by a certain time, and is subject to the payment of interest in the meantime.

With reference to these last two securities Mr. Manning accepted the view that, inasmuch as they were debts payable at a future time, they came within the decisions in *Langdale* v. *Whitfield* (1), and that the amounts represented by the debenture stock and the debenture bond in question pass under the description of money to which the testatrix was entitled.

A further case raised at a late stage in the argument was that of 4*l.* 10*s.* per cent. War Loan, 1925/45 issue. The testatrix held 500*l.* of this War Loan at the time of her death, and the question is whether that is money to which she was entitled at the time of her death. I have been referred to cases in which it has been held that a holding of consols and the old 3 per cent. stock was not "money" within a gift of "money" in a will. It was held in such cases that the right to such stock is a right to receive an annuity in perpetuum, subject to an option of redemption on the part of the Government. Those cases are entirely, as it appears

(1) 4 K. & J. 426.

to me, different from the present case, for in those cases there was no debt on the part of the Government, there was no obligation to repay the amount of the principal represented by the consols or 3 per cent. annuities, the only obligation being to pay interest in perpetuum, with a right on the part of the Government, if it thought fit, to commute that obligation, by repayment of the amount represented by the consols or 3 per cent. annuities. But in the case of the War Loan, 1925/1945, there is a definite obligation on the part of the Government to repay the amount lent by 1945, with an option on the part of the Government to repay at an earlier date if it thinks right so to do, and, of course, there is an obligation to pay interest in the meantime. It is a debt of the Government payable at a future date, with interest in the meantime payable on the amount of the debt; and I am unable to distinguish that case from the case of the Investment Trust Corporation, Ld., Debenture Stock, with which I have already dealt. In each case it appears to be a debt repayable at a future date with interest payable on it in the meantime.

I turn now to the perpetual debenture stock. In the case of this perpetual debenture stock there is no right to call for the repayment of the amount of the stock, and at the testatrix's death the only thing she was entitled to was payment of the interest on the stock as and when it became due. It appears to me, therefore, that it is impossible to hold that, so far as the perpetual debenture stock is concerned, the sums represented by it are money to which the testatrix was entitled at the time of her death. For similar reasons, I am of opinion that the debenture stocks which are comprised in Part II. of the exhibit "S. V. T. 2" are not money to which the testatrix was entitled at the time of her death. Those stocks are redeemable only at the option of the company and the testatrix never had any right to call for repayment of the amount represented by them. It is for the company to say whether it will or will not repay; but, subject to the right of the company to pay off the amount represented by the stock in question, the only right of the stockholder is

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to receive interest upon the stock as and when it from time to time becomes payable. In my opinion, stocks of that description are not money to which the testatrix was entitled at the time of her death. But it is said that if the sums represented by the stocks are not moneys to which the testatrix was entitled, the interest payable on them is money to which the testatrix was entitled at the time of her death. Now the position, as it appears to me, is this. The testatrix had a right to sue the company for the payment of interest at the expiration of the half-yearly or quarterly period at the end of which interest in each case became payable, and in my view the interest which is payable on perpetual debenture stock or debenture stock which is redeemable only at the option of the company is in the nature of an annuity which, as was said in the case of *Lowe* v. *Thomas* (1), does not fall within the description of money.

In my opinion, therefore, neither the amount represented by the stock in Parts I. and II. of exhibit "S. V. T. 2," nor the interest payable in respect of these stocks, is money to which the testatrix was entitled at the time of her death.

Solicitors for plaintiffs and defendant legatee: *A. F. & R. W. Tweedie.*

Solicitors for defendant next of kin: *Gibson & Weldon, for Elvy Robb & Berry, Tunbridge Wells.*

(1) 5 D. M. & G. 315.

R. M.

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OF THE MIDDLE TEMPLE; PRINCIPAL AND DIRECTOR OF LEGAL STUDIES OF THE LAW SOCIETY; FELLOW OF KING'S COLLEGE, CAMBRIDGE; EDITOR.
ASSISTED BY A BODY OF ASSOCIATE EDITORS.

THE work was originally published in eleven separate parts, the preparation and publication of which was spread over a good many years. During this time, JENKS' DIGEST OF ENGLISH CIVIL LAW became well known, and acquired a reputation, almost in every quarter of the world, as the leading work on the Civil Law of England.

For some time it has been the intention of the Publishers to arrange for the parts originally published to be consolidated, brought up to date, and issued as a new edition in two volumes. The facility of reference which this provides enables the utility of the work to be further increased. Owing to various difficulties the publication of the new edition in two volumes has had to be postponed until now.

The New Edition being now ready, the Publishers have decided, FOR A LIMITED PERIOD ONLY, to offer it to Practitioners at the SPECIAL OFFER price of 28s. per volume (postage 1s. 3d. extra). Early application is, however, necessary to secure the benefit of this reduction.

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